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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1980] OLRB REP.

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations
Boards Reports, Butterworth & Co., Toronto.*



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PRACTICE NOTE Number 12
May 31, 1980

WAIVER OF HEARING

NON-CONSTRUCTION APPLICATIONS FOR CERTIFICATION
Notice of New Practice Note

1. It is the Board's experience that many certification applications can be resolved upon agreement of the parties without the necessity of a formal hearing. Therefore, as a service to the parties, the Board now screens all applications for certification and contacts the parties in those cases which appear amenable to disposition without a hearing. Waiver forms are sent to the parties to facilitate the procedure. This Practice Note summarizes the waiver procedure that is followed in selecting the cases and in dealing with the parties.
2. Following the terminal date and after a reply has been received, the Board reviews all applications for certification and selects those cases in which
 - (a) The applicant has proven its status as a trade union in an earlier proceeding before the Board;
 - (b) The bargaining unit descriptions appear to overlap and relate to the same group of employees;
 - (c) The membership evidence and Form 8 declaration filed by the applicant are regular in all respects;
 - (d) No charges or allegations or irregularities or improprieties are outstanding;
 - (e) No statement of desire has been filed; and
 - (f) No other union is claiming or seeking bargaining rights for employees in the bargaining unit.
3. The Board appoints a Labour Relations Officer to contact the parties and attempt to secure agreement as to the description of the bargaining unit. If there is a dispute over the bargaining unit description, the Officer discusses the issues in dispute and assists the parties in resolving the description. In those cases where the description of the bargaining unit is agreed between the parties, the Officer ascertains from the respondent the number of employees falling within the unit. The Officer then advises the applicant as to the number of employees falling within the

unit as shown on each of schedules A, B, C and D and advises the applicant of the number of membership cards, if any, which do not correspond to the names of persons falling within the bargaining unit. Where the composition of the bargaining unit is agreed, the parties are asked whether they require a formal hearing before the Board. Where the parties agree to the disposition of an application without a hearing, the Officer then reveals all relevant information with respect to trade union membership filed in support of the application. The parties receive the same information as if there had been a formal hearing before the Board.

4. Where the parties are unable to agree to the description of composition of the bargaining unit, or where there are any other outstanding issues remaining in dispute, or where the parties fail to agree to waive the hearing before the Board, the matter is heard at the date and time set out in the Notice of Hearing.
5. Upon an oral Waiver of Hearing being given to the Officer by the parties, a telex is forwarded confirming the Waiver of Hearing; requesting the filing of the duly-executed Waiver Form; confirming the agreed-upon bargaining unit; setting out the number of cards filed by the applicant which corresponds with the employees in the bargaining unit; and cancelling the hearing originally scheduled. The Board's decision setting out the disposition of a proceeding in which the hearing is waived contains a statement with respect to trade union status; a description of the agreed upon bargaining unit; the number of employees in the bargaining unit; and a detailed statement advising the parties as to the quality and sufficiency of the membership evidence similar in form to a decision rendered in an application for certification in the construction industry disposed of without a hearing.
6. Where it appears to the Officer that the application may be dismissed because no membership evidence has been filed on or before the terminal date or because the application is untimely, the Officer contacts the parties and ascertains whether they will agree to waive a hearing before the Board. If the applicant seeks to withdraw an application after being contacted by a Labour Relations Officer, the Board may not grant leave to withdraw, and instead dismiss the application.

1804-79-R Amalgamated Clothing and Textile Workers Union – Toronto Joint Board, Applicant, v. Addidas Textile (Canada) Ltd., Respondent.

Certification – Interference in the Trade Union – Membership Evidence – Manager of employer contacting Union – Directing and initiating initial organizing campaign – Union withdrawing first application and refiling with fresh evidence – No assistance by manager in second application – Whether Union receiving employer support – Whether membership cards valid

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members H.J.F. Ade and O. Hodges.

APPEARANCES: James Hayes, Jack Matraia, Tony Pileggi and Frank Aquino for the applicant; S.C. Bernardo and Werner W. Syndikus for the respondent.

DECISION OF THE BOARD; May 29, 1980

1. The name “K & K Clothing Company Limited” appearing in the style of cause of the Board’s decision of January 23, 1980 as the name of the respondent is amended to read: “Addidas Textile (Canada) Ltd.”

2. The Board certified the applicant trade union in a decision dated January 23, 1980. By letter dated January 31, 1980 the respondent company seeks reconsideration of the Board’s decision to certify the applicant. The respondent alleges that the membership evidence relied upon by the trade union was obtained through the support of management officials, including the general manager, the plant supervisor and two foreladies, contrary to sections 12 and 56 of the Act. The matter was put on for hearing on May 1, 1980.

3. The parties agreed that the letter to the Board from counsel for the respondent dated January 31, 1980 and the letter in reply from counsel for the union dated February 7, 1980, with certain agreed amendments and additions, would constitute an agreed statement of fact in this matter. The relevant portions of the respondent’s letter of January 31, 1980, with the additions inserted, read as follows:

“.....

On or about December 3, 1979, a management official of the Company, Irmagaard Krause, was terminated. Shortly thereafter George Krause, the general manager of the respondent and the #1 person in the plant, and the husband of Irmagaard Krause told the supervisor of the company that the Company should have a Union. Upon that suggestion the supervisor (Mr. Cabral) immediately telephoned Jack Matraia, a union representative, and informed him that the employees of the company wanted a trade union. Matraia stated that a Union organizer would call him. On Tuesday, December 4, 1979 a Union organizer, Tony Peleggi, telephoned the supervisor at the plant located at 650 King Street West and arranged a meeting with him. At approximately 1:00 p.m. that day Peleggi met with the supervisor just outside the plant and gave him a number of Union applications for membership cards.

The supervisor then took the cards back into the plant and gave them to two foreladies. The two foreladies had been previously told by the supervisor that the general manager was behind it and that there would be no trouble from the Company in distributing the cards. The foreladies then proceeded to ask employees to sign Union membership cards on Company time during working hours in the plant. The employees were requested by the foreladies to come in small groups to a washroom where the signing took place. The employees asked about the Company and were told that the supervisor had said that there would be no problem with the Company and that the supervisor had obtained the cards from the Union for them to sign. They were also told that George Krause knows about the union.

The foreladies delivered some membership cards and collected money to the supervisor on December 4, 1979. The supervisor told them to hurry and obtain more cards. On Wednesday, December 5th Peleggi telephoned the supervisor to enquire about the organizing and urge him to hurry up. The supervisor talked to the foreladies and indicated that the Union was in a hurry and for them to sign up the remaining employees. The remaining cards were delivered to the supervisor by the foreladies approximately 12:00 a.m., noon, December 5, 1979. Virtually all of the employees of the respondent except those who were absent signed union membership application cards.

At the request of the supervisor, Peleggi came to the plant and obtained the documents and money that day. On December 4, 1979 an application for certification was filed for the respondent's employees working in the plant at 650 King Street West, Toronto (File No. 1709-79-R). The terminal date in that application was December 13, 1979. Sometime after the Company had posted the Form 5 notice to employees, Peleggi telephoned the supervisor at the plant and told him that the first application was improper because the foreladies had obtained the membership evidence for the Union from the employees. That same day, the supervisor told the foreladies that they would have to sign the cards again.

On or about December 14, 1979 during the Christmas party at the plant the supervisor told the general manager that the Union organizers were outside the plant and the general manager immediately left to speak with the union representatives. As the employees were leaving the plant from the Christmas party they were approached by 7 or 8 Union organizers and signed Union membership documents on the sidewalk at the door of the plant, some in the presence of the general manager. The union representatives also approached the foreladies who signed membership documents in the presence of other employees. On December 17, 1979 the Union withdrew its existing application for certification and filed a new application for certification (File No. 1804-79-R). On or about January 15, 1980 the general manager attended at the Ontario Labour Relations Board hearing in the above referred to application as a representative of the Company. At the hearing it was indicated that the Union had filed 104 membership documents and that 98 of those documents corresponded with the respondent's list of 115 employees. The Board indicated that a certificate would be issued. Upon returning to the

plant after the hearing the general manager ordered one of the members of the bargaining unit to purchase a bottle of liquor. When the employee returned with the liquor to the general manager's office, the general manager stated in the presence of the supervisor 'let's celebrate' and that 'they had won'. The general manager also that day spoke to the employees in the plant and told them that 'they had won.'

.....”

The relevant portions of the applicant's letter of February 7, 1980, with the additions inserted, read as follows:

“.....

On or about December 3rd, 1979 one Arnold Cabral telephoned Jack Matraia who is Manager of the Toronto Joint Board and explained that people working at K & K were interested in the union. Cabral stated that his wife worked in one of the union shops. Mr. Matraia invited Cabral to attend at his office, which he did later in the day. Cabral told Mr. Matraia when asked, that he looked after the cutting room which had three or four workers and worked on the table with them doing the same work. Mr. Matraia assumed that Cabral was a lead hand. Cabral was given blank membership cards and strict instructions that they were not to be signed during working hours although solicitation on lunch hours would be acceptable.

During the meeting, the subject of the discharge of Mrs. Krause was raised. Mr. Matraia explained that if she were a member of management he could only bring it up during negotiations, if the union were to be certified, but such a matter could not be part of any formal proposal.

The following day Cabral telephoned Mr. Matraia and requested more cards. Mr. Tony Pilleggi, an organizer with the union, then attended outside the plant at lunch hour and gave him more cards as requested. Mr. Pilleggi, in accordance with union practice, took custody of cards signed to date and the dollar payments. The application for certification was filed on December 4th 1979.

On December 11th, 1979 Mr. Cabral was invited to have dinner with Mr. Matraia and Mr. Sam Fox, Co-Director of the union. During the course of dinner it became clear to the union representatives that there had been some participation by foreladies in the solicitations of cards filed with the Board.

On or about the following day representatives of the union contacted our office and explained that foreladies may have been involved. The union immediately accepted our advice that, although they had been innocent of any irregular solicitation, an application based upon cards obtained in this manner should not be left with the Board. The union acted promptly and without hesitation. Pilleggi advised Cabral that the first application would have to be withdrawn.

Mr. Matraia then requested that virtually the entire union staff attend outside the premises of the respondent on December 14th, 1979 in order to solicit membership support from employees leaving the plant.

New cards were signed and dollars collected. The staff were not familiar with the faces of the many people leaving the plant and signed up anyone who indicated support of the trade union, including 6 or 7 foreladies.

Additionally, union representatives attended at various employees' homes where cards were also signed and statutory payments collected.

While solicitation of union membership was taking place on December 14th, Mr. George Krause did come out and approach Mr. Matraia. Mr. Matraia led Mr. Krause 40 feet away (in view but out of hearing) and advised him that he could not speak with him as he was working and that he could not discuss anything with him. Krause was coming from a Christmas party and he had obviously been drinking. Mr. Matraia had met Krause about ten or twelve years ago and they were known one to the other but had not been in contact for years until this period. On December 11th Krause did meet privately with Mr. Matraia in the union office and ask if he could help his wife. There was absolutely no discussion whatsoever about the union on this occasion.

On December 17th the union formally withdrew its first application [Board File No. 1709-79-R] and filed a second one with entirely fresh membership evidence. Ultimately, in the ordinary course, the union was certified by the Board and holds a certificate dated January 23, 1980. ..."

4. The company argues that the Board should find a violation of sections 12 and 56 of the Act and dismiss the application. The company argues in the alternative that the Board should give no weight to the membership evidence and dismiss the application. The company argues in the alternative that if the Board does not dismiss the application on either of the alternative grounds put forward by it, at the very least it should revoke the certificate and direct the taking of a representation vote. The company maintains that in the circumstances of this case the re-signing of employees should not affect the Board's determination. The company maintains that it was open to the union to withdraw its first application prior to re-signing the respondent's employees and to advise the employees of the reason for the withdrawal. The company argues that instead, the union chose to re-sign the respondent's employees prior to withdrawing the first application and in so doing intended to capitalize on the management support which it had acquired in signing the respondent's employees in the first instance. The company argues that on the evidence it must be found that the employees continued to believe that the company supported and encouraged their membership in the applicant union when they signed cards the second time and further that the re-signing was conducted in a manner designed to foster this belief.

5. The union argues that the general manager of the company was not acting in the interests or on behalf of the company but as an employee who was upset with the company for terminating the employment of his wife. The union relies on *Japamco Company Limited*, [1979] OLRB Rep. Feb. 106, *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Nov. 651 and *Casimir Jennings and Appleby*, [1978] OLRB Rep. Feb.

130, in support of the proposition that support tendered to a trade union by a management person acting on his own and not on the instruction of or in the interests of the employer organization does not trigger the application of section 12 of the Act. If Mr. George Krause had been acting on behalf of the company, it is the position of the union that the company cannot now attempt to traffic on its own wrongdoing. In this case, however, the union maintains that he was acting on his own. The union further maintains that whatever taint attached to the initial application was purged when the union resigned the employees. The union argues that the employees would have known that the first application was unsatisfactory when asked to sign a second time and pay a second dollar. The union maintains that in the real world of the garment industry it has to move quickly to re-sign the employees and that its decision to move quickly cannot be found to create a section 12 bar to the application. In the event the Board decides to direct the taking of a representation vote the union asks the Board to hold the vote the day following the release of its decision in order to eliminate any electioneering by the employer.

6. Section 12 of the Act stipulates:

“The Board shall not certify a trade union if any employer or any employers’ organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.”

The purpose of the section, in keeping with the scheme of the Act, is to maintain the necessary arm’s length relationship between employers on the one hand, and trade unions, as representatives of employees, on the other. In applying section 12, the Board has drawn a distinction between support tendered by the employer, either directly or through persons holding managerial positions within his organization, and support tendered by persons who occupy management positions but act on their own initiative against the employer’s interest in support of the interests of the employees. Although a question may arise in these latter circumstances as to the voluntariness of the membership evidence, the necessary arm’s length relationship between employer and trade union may not be undermined in a manner which requires the automatic application of the section 12 bar. In rejecting the automatic application of section 12 in these circumstances (as in the *Leamington Hospital* case, [1973] OLRB Rep. June 376) the Board stated at para. 14 of the *Children’s Aid Society* case, *supra*:

“... The Board recognizes that in the modern organizational setting interests of individual persons deemed to be managerial are not necessarily coincidental with those of the employer. If the evidence establishes that such persons acted on behalf or in the interests of the employer then undoubtedly the section 12 bar would apply. If, however, the evidence establishes that the persons were acting not on behalf of the employer but contrary to the wishes and interests of the employer (see *Air Liquide* case (1964) CLLC 16,002) then it cannot be said that the employer has participated contrary to section 12, or section 56 for that matter. Similarly if the evidence establishes that the disputed persons have been acting in their self interest rather than on behalf of or in the interest of the employer, then again section 12 should not be activated.”

(See also *Edwards and Edwards Ltd.* 52 CLLC ¶ 17,027, *Municipality of Casimir, Jennings and Appleby*, *supra*, *Japamco Company Limited*, *supra* and *York Steel Construction Limited*, decision dated January 24, 1980, unreported, Board file No. 1501-79-R.) The purpose of the section is to prevent the certification of a trade union which is party to a “sweetheart deal” with an employer or is the recipient of employer support so that it does not owe its sole allegiance to those whom it is certified to represent. The Board has consistently applied the section having regard to its underlying purpose.

7. Mr. Krause, the general manager of the company, initiated the union’s organizing campaign and directed the plant supervisors and foreladies in the carrying out of the initial campaign. The company finds itself in a difficult situation. If Mr. Krause was acting on behalf of the company or its interests, the company’s application for reconsideration must be seen as an attempt to capitalize on its own wrongdoing. If, on the other hand he was acting on his own and against the company’s interest, the support tendered may not be support within the meaning of section 12. Mr. Krause did not act on instructions from his superiors or from the principals of the company. Indeed, we were advised at the hearing that Mr. Krause is no longer with the company. While we can only surmise as to his motive, it is clear that he did not act in the interests of the employer. He was, however, the senior representative of the company stationed at the plant with obvious independent discretion in matters relating to the day-to-day direction of the operation. If the union had not moved to re-sign the company’s employees in support of a fresh application for certification and had proceeded to deal with Mr. Krause as representative of the company, the imposition of a section 12 bar, on reconsideration, may well have been appropriate.

8. However, in this case, the union re-signed the employees of the respondent following the filing of the initial application and did so without the direct assistance of anyone connected with the company. The membership evidence submitted in support of the second application was obtained by union organizers outside working hours and outside the plant. It is clear that this company and this union are not party to a “sweetheart deal” and while the union could have withdrawn its first application prior to re-signing the respondent’s employees, we are satisfied that in re-signing and collecting a second dollar the applicant attempted to extricate itself from the compromising situation created by the unsolicited assistance given by Mr. Krause. The mischief which section 12 is designed to deal with does not exist in this case. Without at this point considering whether the circumstances under which the employees signed membership documents in support of the second application gives rise to a doubt in the mind of the Board as to the true wishes of the employees, the Board is satisfied the union did not enjoy employer support within the meaning of section 12 of the Act in connection with the application which resulted in the issuance of the certificate.

9. The Board is given a discretion under section 7(2) of the Act to direct the taking of a representation vote even when satisfied that more than fifty-five per cent of those in the bargaining unit are members of the trade union. As a matter of practice the Board exercises its section 7(2) discretion in favour of a vote when a statement of desire in opposition to the certification of a trade union is proven to be a voluntary expression and contains a sufficient number of signatures which overlap with those appearing in the union’s membership evidence so that a question arises in the mind of the Board as to the true wishes of the employees who have signed membership cards in support of the trade union. When reference is had to the circumstances under which the initial organizing campaign took place in this case, to the failure of the union to withdraw its initial application prior to resigning the respondent’s

employees, to the fact that foreladies were signed along with bargaining unit employees and to the fact that Mr. Krause was in the general vicinity when the re-signing took place, a doubt exists in the mind of the Board as to the true wishes of those who signed membership cards in support of the union's second application for certification. This Board has long recognized that even subtle employer support or tacit approval to the circulation of an anti-union petition can thwart free expression. The circumstances surrounding the re-signing of the respondent's employees give rise to the same concerns with respect to free expression. Accordingly, the Board hereby exercises its discretion under section 95(1) of the Act to revoke the certificate granted by decision dated January 23, 1980. Furthermore, the Board hereby exercises its discretion under section 7(2) of the Act to direct the taking of a secret ballot representation vote.

10. All employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

11. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

12. There is nothing before the Board as would cause it to abridge the normal time frame for the taking of a representation vote as requested by the applicant.

13. The matter is hereby referred to the Registrar.

**2331-79-U 2332-79-U International Woodworkers of America,
Complainant, v. B & S Furniture Manufacturing Limited, Respondent.**

Discharge for Union Activity – Employer officials making anti-union statements involved in lay-off decision – Failure to call witness to explain decision leading to adverse inference – No satisfactory explanation tendered by employer

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Jeffrey Enger and Tony Marcantonio for the complainant; Julia Schmeisz for the respondent.*

DECISION OF THE BOARD; May 9, 1980

1. These two complaints filed under section 79 of *The Labour Relations Act* in respect of alleged violations of sections 3, 56, 58(a) and (c), and 61 of the Act were consolidated by the Board at the hearing on April 17, 1980, pursuant to Rule 56. The consolidated

complaints allege that the grievors, Luigi Cavacece and Vasilios Droulias, were dealt with by L. Schmeisz Sr., President of the respondent contrary to the aforementioned sections of the Act on or about February 19, 1980 and February 20, 1980 respectively, in that Schmeisz did on his own behalf or on behalf of the respondent terminate their employment without notice. A similar complaint on behalf of Concordia Novalta was withdrawn by leave of the Board.

2. The sole witness who testified on behalf of the respondent was Julia Schmeisz who at all material times was the Secretary-Treasurer of the respondent. She testified that the respondent began to experience financial difficulties in May of 1979 which were exacerbated by a shrinking market coupled with high interest rates and a growing inventory. She stated that the grievors were laid-off for financial reasons and denied that any anti-union sentiment was involved in the decisions.

3. At all material times, L. Schmeisz Sr., the husband of Julia Schmeisz, was the sole owner and President of the respondent. Their son, L. Schmeisz Jr. was at all material times a Director of the respondent. Julia Schmeisz worked in the office of the respondent and was responsible for matters including bookkeeping, scheduling, sales, payment of employees, hiring, and discharging employees. The actual supervision of the workforce was carried out by her husband and son with the assistance of at least one foreman and one leadhand.

4. Julia Schmeisz denied having any knowledge of union activity among employees in the plant prior to receiving a telephone call on January 21 or 22, 1980 from an individual who identified himself as an official of the Board and inquired as to whether a notice of application for certification had been received. However, she conceded in cross-examination that if there had been "union talk", it would have been her husband and her son who would have heard it.

5. Julia Schmeisz testified that Cavacece and Droulias were laid-off because they were not as "flexible" as the employees who were retained since they could not be moved around to jobs other than those which they were performing. She admitted that she did not work on the floor of the plant herself but stated that she relied upon information from her husband, her son, the foreman, and the leadhand about what was going on in the plant. She further indicated that she relied upon this information in awarding pay increases to employees and in deciding which employees should be laid-off.

6. The grievor Cavacece was hired by the respondent as a cabinet maker helper in September of 1977 at an hourly rate of \$3.30 which was subsequently increased to \$4.80. He testified that union activity at the plant commenced in late October or early November of 1979. He further testified that he joined the complainant union in December of 1979 and attended several union meetings prior to his lay-off by the respondent, including one meeting in January of 1980 at which he was the first person to arrive and at which he requested a change in the date of the next union meeting to enable him to attend. He spoke in favour of the union at that meeting by relating his previous favourable experience with unionization. It was also his testimony, which was unrefuted, that a week prior to the certification vote (ordered by the Board to be held on February 12, 1980) L. Schmeisz Jr. asked him if he had ever learned that Andreas Brauzeau (an employee who was subsequently laid-off or discharged by the respondent on January 21, 1980 and ordered reinstated by another panel of the Board in separate section 79 proceedings in File No. 1985-79-U), had tried to put a union

in the plant. He further testified that Schmeisz told him that a friend who had worked for the union as a union representative for five years had said that the union was “no good”. As the result of the certification vote the union was certified by the Board on February 25, 1980 (File No. 1937-79-R). Prior to his “lay-off” on February 19, 1980, Cavacece had been working his regular hours on a steady basis. He testified that the lay-off was totally unexpected since he had been quite busy in his job in the finishing department and that it was a surprise to him to be told by Julia Schmeisz that there was a shortage of work. He further testified that if his job on the press in the finishing department had to be eliminated, he was capable of doing other jobs since he had performed several other jobs in the plant.

7. The grievor, Droulias, commenced employment with the respondent in 1968 as a cabinet maker helper and was subsequently promoted to cabinet maker. He confirmed that the union’s organizational activities commenced in late October or early November of 1979 and stated that he and other employees discuss the union at the plant. He joined the respondent union on December 30, 1979, attended four or five meetings, and spoke in favour of the union at those meetings. He testified that L. Schmeisz Sr. spoke to him about the union on three separate occasions, the first being about the time that the notice of application for certification was posted. At that time, Schmeisz asked him if he knew anything about the union and said: “I think that many people in the plant know about this”. Approximately ten days later, Schmeisz told him: “We should have a meeting in the lunch room to find out who knows about the union and who doesn’t”. A meeting was called in the lunch room the same day by Jim Copping, a leadhand with some supervisory responsibilities. The meeting lasted from approximately 10:15 to 10:50 a.m. and included the grievor’s normal ten minute break (from 10:30 to 10:40 a.m.). It was not disputed that this meeting could only have taken place with the approval or acquiescence of management. All employees of the respondent (except members of the Schmeisz family and the foreman) attended this meeting. When one of the piece-workers spoke against unionization at that meeting and asked Droulias what he knew about the union, Droulias said: “This is not really your business because you work piece-work and I don’t think you have a right to vote if there is a vote in the plant”. In view of this response, it would not have been difficult for Copping to conclude that Droulias was a supporter of the union. Copping also asked employees what they knew about the union and said: “They will cut our bonus for Christmas. They will cut our insurance. We are going to lose more by this”. Droulias testified that he understood Copping to be referring to the respondent when Copping used the word “they”. About a week before the vote, Schmeisz spoke to Droulias a third time about the union. On this occasion he said that a union is only good for big business and is not good for small business. He asked Droulias how much his last Christmas bonus had been and stated that he would cut the Christmas bonuses.

8. Droulias testified that he was told of his lay-off by L. Schmeisz Jr. on February 20, 1980, and that the reason given initially by Schmeisz was that there was “not enough work”. However, he further testified that when he questioned this by stating that all of the other employees who were not being laid-off had been hired by the respondent after he was hired, Schmeisz said: “You know why. Because you support the union”.

9. Section 79(4a) of the Act provides:

(4a) On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discrimi-

nated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

Accordingly, in this case the burden of proof is on the respondent to establish on the balance of probabilities that it did not act contrary to the Act.

10. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

"... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred".

Similar considerations are applicable to lay-offs. In *Tillotson-Sekisui Plastics Limited*, [1979] OLRB Rep. Oct. 1027, a case involving a complaint in respect of the lay-off of twenty-three employees, the Board stated (at paragraph 11)

"This matter falls within the ambit of section 79(4a) which places the burden of proof in a complaint such as this upon the employer. The Board referred to the nature of the onus which falls to the respondent in these matters in the *Pop Shoppe (Toronto) Limited* case [1976] OLRB Rep. June 299, wherein at paragraph 4 the Board stated:

'Section 79(4a) of *The Labour Relations Act* places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer's actions were not in any way motivated by anti union sentiment; the employer's actions must be devoid of 'anti-union animus.' (See the *Bushnell* case (1974), 4 O.R. (2d) 332.) The employer cannot engage in anti union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti-union motive. The employer best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti union motive and which the evidence establishes to be the only reason for its conduct. (See *Barrie Examiner* [1975] OLRB Rep. Oct of 745 and *The Corporation of the City of London* [1976] OLRB Rep. Jan. 99.)'

11. After carefully reviewing all of the evidence, we are not satisfied that the respondent's decision to lay-off the two grievors was devoid of anti-union motive. The failure of the respondent to call as witnesses the three members of management (L. Schmeisz Sr., L.

Schmeisz Jr., and Copping) who are alleged to have made the anti-union statements set forth above and who would be the only members of management capable of testifying from their own observation, knowledge, and experience concerning the “flexibility” of the grievors as compared with other employees who were not laid-off, justifies the Board in drawing the inference that their evidence would have been unfavourable to the respondent’s case or at least would not have supported it (see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974) 535-537). In inferring a result adverse to a party’s cause as a result of that party’s failure to call a particular witness, the Board, in *McGregor Hosiery*, [1976] OLRB Rep. Oct. 583 at paragraph 31, relied upon the decision of Lerner J. in *Holmes v. Alexon*, [1975] 7 O.R. (2d) 11, and quoted the following passage from the headnote of that case:

“Where a party or witness fails to give evidence which was within his power to give and by which relevant facts might have been elucidated, the court is justified in drawing the inference that the evidence which might have been given would have been unfavourable to the party to whom the failure is attributed.”

(See also *Beaver Engineering Limited*, [1973] OLRB Rep. Jan. 57, para. 10; and *F. G. Bradley Co. Ltd.*, [1973] OLRB Rep. June 342, para. 18). Although the party against whom the inference is drawn may explain it away by showing circumstances which prevented the production of the witnesses (see *Murray v. Saskatoon*, [1952] 2 D.L.R. 499, 506 (Sask. C.A.)), the statements by Julia Schmeisz that the family “can’t afford to have them sitting here all day without pay” and that they were unnecessary witnesses because she speaks for the respondent, which statements were the only explanations provided to the Board concerning the failure of these members of management to testify, do not suffice in our view to explain away the inference in the present case. Accordingly, the Board has no reason to disbelieve the grievors’ uncontradicted recitation of the anti-union statements attributed to those members of management.

12. Having regard to all of the evidence, the Board concludes that the respondent has failed to discharge the onus placed upon it by section 79(4a) of the Act and we accordingly find that each of the grievors had been dealt with by the respondent contrary to the Act.

13. The Board therefore orders:

- (i) that Luigi Cavacece and Vasilios Droulias be reinstated by the respondent forthwith;
- (ii) that Luigi Cavacece and Vasilios Droulias be fully compensated by the respondent for all lost wages and benefits sustained through the respondent’s violation of the Act; and
- (iii) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in the *Hallowell House Limited* case (Board File No. 0905-79-R), decision dated January 21, 1980).

14. The Board remains seized of this matter in the event that a dispute arises over the implementation of this award.

2293-79-U David Theodore Balint, Complainant, v. Chrysler Canada Ltd., and U.A.W. Local 444, Respondents.

Adjournment – Duty of Fair Representation – Practice and Procedure – Counsel retained shortly before hearing – Adjournment refused – Whether company proper party to section 60 complaint – Whether delay in filing complaint causing Board to dismiss – Grievance settled without complainant's approval – No violation of section 60

BEFORE: R. D. Howe, Vice-Chairman.

APPEARANCES: *David Balint and John P. Corrent for the complainant; D. W. Brady, L. Bulat and C. Cooper for the respondent Chrysler Canada Ltd.; Jim O'Neil, James Phillips and Gerry Bastien for the respondent U.A.W. Local 444.*

DECISION OF THE BOARD; May 1, 1980

1. This is an application under section 79 of *The Labour Relations Act*, alleging a contravention of section 60 of the Act. That section provides as follows:

“60. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

2. The complaint as originally prepared and filed by the complainant (without the assistance of counsel) named only Chrysler Canada Ltd. (the “Company”) as respondent. However, at the hearing of this matter counsel for the complainant requested that Local 444 U.A.W. (the “Union”) be added as a respondent. Since Mr. O'Neil stated on behalf of the Union that he had no objection to an amendment to include the Union as a respondent and since the Union had been specifically named in the complaint as a trade union that may be affected by the complaint and had accordingly received a copy of the complaint and Notice of Hearing, the Board, pursuant to Rule 54, directed that the Union be added as a respondent.

3. At the hearing of this matter in Windsor on April 9, 1980, counsel for the complainant requested an adjournment on the basis that he had not been retained until April 3, 1980 to represent the complainant at the hearing and that previous commitments had precluded him from properly preparing his case and obtaining the necessary witnesses. This request was opposed by the Company and the Union. After carefully considering the representations of the parties and noting that the complaint was filed on March 7, 1980, and that the complainant was notified of the date of the hearing by Notice of Hearing dated March 11, 1980, the Board denied the requested adjournment in accordance with the Board policy concerning adjournments as capsulized in *Nick Masney Hotels Limited*, [1968] OLRB Rep. Nov. 833, since the Board did not view the situation as being one in which the request for an adjournment was based on circumstances completely out of the control of the party making the request where to proceed would seriously prejudice such party. With respect to the non-availability of witnesses, the Board noted that it is the responsibility of the complainant to

do whatever is necessary to ensure that witnesses essential to his case are present, including obtaining and serving the required summons (see *Baycrest Centre*, [1976] OLRB Rep. Aug. 432).

4. At the commencement of the hearing, counsel for the Company requested that the Board dismiss the complaint against the Company because the only two sections of the Act alleged to have been violated were sections 60 and 79. Section 60 imposes a duty only on a trade union or council of trade unions; it does not impose any duty on an employer. It follows, therefore, that the complainant cannot rely on section 60 in support of a complaint against the Company (see *Ford of Canada*, [1972] OLRB Rep. Apr. 387). Moreover, as the Board has noted in many cases, section 79 is a procedural section which merely provides an avenue for obtaining relief where it is shown that there has been a violation of a substantive provision of the Act (see, for example, *Ford of Canada*, *supra*; *Eagle Precision Tool Limited*, [1969] OLRB Rep. July 551; and *National Sea Products Limited*, [1961] OLRB Rep. May 62). Nevertheless, as conceded by the Company, an employer may properly be joined for remedial purposes in a section 79 complaint in which a violation of section 60 has been alleged (see *Nick Bachiu*, [1975] OLRB Rep. Dec. 919). Since the complaint in the present case was based upon allegations concerning the manner in which the Union handled the complainant's grievance following his discharge by the Company, the Board declined to dismiss the complaint against the Company.

5. Counsel for the Company also requested that the Board dismiss the complaint on the ground of extreme delay by the complainant in filing his complaint. Although the complainant was discharged effective January 31, 1979 by letter dated February 8, 1979, he did not file his complaint until March 7, 1980. However, the complainant's grievance was not settled by the Union and the Company until November 10, 1979 and the complainant did not learn of this settlement until mid November. When the complainant was called into work on November 21, 1979, he attempted to avoid what he perceived to be an unfair aspect of the settlement by writing the following sentence at the bottom of the conditional reinstatement sheet: "I do not agree with the reasons for my dismissal and would like the evaluation of an arbitrator". Since this addition was not acceptable to the Company, the complainant was not permitted to return to work at that time. The complainant then obtained a legal advice certificate from the Ontario Legal Aid Plan and consulted with counsel. On the advice of counsel, the complainant signed another conditional reinstatement sheet on December 11, 1979 without adding the aforementioned sentence, and returned to work on December 13, 1979. Thus, it was not until December of 1979 that it became clear to the complainant that his attempts to obtain relief without resorting to legal proceedings were not destined to succeed. After returning to work, the complainant attempted to obtain a further Legal Aid certificate to enable his counsel to file a complaint with the Board. However, the complainant decided against obtaining such a certificate when he was informed that a further certificate would entail the placing of a lien against his home. The complainant then contacted his M.P.P. and with the assistance of his secretary, prepared the complaint which gave rise to these proceedings, which complaint was filed on March 7, 1980.

6. The Board's practice concerning delay was summarized in *Hayes-Dana Limited*, [1968] OLRB Rep. Apr. 89 at paragraph 6:

"... it has not been the practice of the Board to refuse to hear a complaint under section [79] because of delay in lodging the complaint ex-

cept in the most extreme cases. Where unreasonable delay has occurred the Board in most cases has followed the practice of taking this factor into account in assessing any compensation which might be awarded.”

(See also *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618). Although there was some delay by the complainant in the present case, the Board is of the view that this is not a case of extreme delay of the type which would justify dismissal of the complaint. Accordingly, the Board confirms the ruling which it made at the hearing that the complaint would not be dismissed on the basis of delay.

7. The complainant commenced employment with the Company on July 21, 1959. At the time of his discharge he was a journeyman millwright and work leader. Although it was uncontested that the complainant's workmanship prior to the incident in question had always been excellent, the complainant had on his employment record a ten day suspension for being out of his workplace and a twenty day suspension for insubordination and threatening. Although the complainant did not grieve either of those suspensions, both of which were imposed in 1978, the Union succeeded in persuading the Company to reduce the number of days of suspension actually served by the complainant to three days and fifteen days respectively.

8. The incidents which precipitated the events which form the subject matter of this complaint occurred on January 30, 1979. The complainant's foreman sent the complainant and his work partner to adjust the take-up on the chain drive of the final conveyor in the Company's Windsor assembly plant. The complainant and his partner experienced difficulty executing this task, allegedly as a result of dark, wet, smelly, and crowded conditions in the pit in which the operation had to be carried out. While the operation was being performed, the conveyor chain jumped the sprocket at the top of the conveyor. This caused a line breakdown which lasted for a least 35 minutes and thereby adversely affected plant production. Throughout the grievance procedure, the complainant maintained that the cause of the breakdown was a snag in the conveyor and the absence of a stop button in the pit. However, at the hearing the complainant stated for the first time that his partner had caused the breakdown by using channel locks to turn the nut on the take-up in the wrong direction. The complainant explained at the hearing that he had not previously told anyone that his partner was to blame because “a work leader is not there to do his fellow man harm”, “as a union member you are not supposed to squeal on another member”, and “when I turned in the statement, I didn't know that my partner was going to pin the blame on me”. The grievor also testified that if management had attempted to get the chain back on the sprocket by “jogging the line” instead of having a welder cut the upper plates loose to repair the conveyor “the hard way”, the breakdown would have lasted only one or two minutes.

9. While at work on the following evening, the complainant was summoned to a meeting with his foreman, the general foreman, a representative from the Company labour relations department, and his Union steward. On the way into the meeting, the complainant's steward, Steve Rodenbucher, put his arm around the complainant's shoulder and said: “Dave, just between you and me, what really did take place?” When the complainant explained that he had not caused the breakdown, his steward said: “We'll go into the meeting and see.” Although the complainant would have us draw from this conversation the inference that the Union was against him from the outset, the Board is not prepared to draw any such inference. The more logical inference to draw from the conversation is that the steward

was anxious to discover the true facts of the situation so as to be in a position to assist the complainant as his representative.

10. After hearing a series of what he characterized as “falsehoods” from his foreman at the meeting, the complainant, when asked what he had to say, stated: “I’m getting used to these kangaroo courts of yours. If I had five thousand witnesses you wouldn’t believe me. You’d still take the foreman’s word. If necessary I will fight you from the Highland Park Chrysler Office.” The complainant then walked out of the meeting and returned to work. At the hearing he testified that he left the meeting because he was “fed up” because “every time [he] went into the kangaroo court it ended up in a suspension.” Later that shift in the presence of his steward the complainant was placed on indefinite suspension by management.

11. On the next day the complainant went to the Union Office and explained the events of the preceding evening to Ken Gerard, a Union official, who told him that the matter would be grieved and instructed him to prepare a written statement of the events. After preparing the statement, the complainant presented it to Rodenbucher and to his committeeman, Pat MacNamara.

12. The Company discharged the complainant effective January 31, 1979 by a letter dated February 18, 1979 which included the following paragraph:

“The reason for discharge is for the failure to make a reasonable attempt to perform a job assignment. As a work leader you neglected to undertake proper precautions in performing your job assignment. Carelessness on your part caused a lengthy line break down which adversely affected production. In light of you conduct prior to and following the incident and previous poor record.”

13. In accordance with the Union’s normal practice Rodenbucher discussed the complainant’s grievance orally with the management representation (J. Horoky, General Foreman) in an attempt to settle the matter before putting the grievance in writing. Since the oral discussion did not resolve the matter, Union representative M. J. Rankin presented a written grievance to C. Cooper, a Company Labour Relations Specialist, on February 16, 1979, in accordance with Step 2 of the grievance procedure set forth in the collective agreement. Cooper provided a written reply denying the grievance on February 20, 1979.

14. The grievance was then referred to Gerry Bastien second Vice-President of the Union, who, along with Jim Phillips, the Union Grievance Co-ordinator, discussed the grievance “on at least four different occasions” with Company representatives including L. Bulat, Labour Relations Research & Appeals Specialist. Following those meetings, Bulat prepared a Step 3 answer on April 6, 1979 in which the grievance was again denied.

15. On May 3, 1979, Bastien submitted notice of appeal of the grievance to Step 4 of the grievance procedure. The Step 4 appeal procedure involves a review of the grievance by the Regional Representative of the Union for the area in which the plant is located. In this case, the review was carried out by Andrew Marocko who forwarded the grievance to the International Office of the Union in Michigan where it was discussed at meetings between representatives of the International Union and the Company. Since the Company continued

to refuse to reinstate the complainant, the grievance was returned to Canada and was ultimately resolved during local negotiations for a new collective agreement on November 10, 1979 when the Company agreed to the conditional reinstatement of the complainant without loss of seniority pursuant to a document which contained the following conditions:

- “1. Any grievance(s) filed regarding the above-named employee is hereby withdrawn.
2. For a period of one year following the date of reinstatement, any violation or infraction of Company rules will result in his discharge without Union representation.
3. The employee shall not be entitled to claim for any benefits normally associated with his employment within the period extending from the date of his discharge to the date of his return to work.
4. As a further requirement for employment, this employee shall meet the Company medical standards.
5. Return to work shall take place when work opportunity becomes available.
6. The Company shall send out notice to report to the above-named employee at his last address on file with the Company unless advised otherwise by the Union, and failure by the employee to present himself within five days of the date of such notice will result in the cancellation of this conditional reinstatement.”

16. Although counsel for the complainant did not contend that the Union had dealt with the complainant discriminatorily or in bad faith, he did contend that the Union had acted in an arbitrary manner. While acknowledging that the Union did obtain reinstatement of the complainant without loss of seniority, counsel for the complainant submitted that the Union breached section 60 by failing to keep the complainant adequately informed of the steps being taken to process his grievance, unduly delaying the processing of his grievance, failing to permit him to elect to proceed to arbitration with his grievance, and agreeing to a conditional reinstatement without obtaining any compensation for lost wages and benefits.

17. Most of the evidence adduced on behalf of the complainant was directed toward proving that the complainant's grievance was meritorious. Although in a section 79 complaint alleging a violation of section 60 the Board does not assume the posture of an arbitrator and adjudicate the merits of a complainant's grievance, the Board will give some consideration to the merits of a grievance since the fact that the grievance appears meritorious may lend support to a complainant's claim that he has been represented in a manner that is arbitrary, discriminatory, or in bad faith (see *Antonio Mellilo*, [1976] OLRB Rep. Oct. 613; and *Massey Ferguson Limited* [1971] OLRB Rep. Apr. 217). In the present case the Union did recognize that there was some merit in the grievance since a number of Union officials spent considerable time and effort in discussing the grievance with Company officials at the various steps of the grievance procedure. Through these discussions, the Union succeeded in persuading the Company to clean up the pit area and install fluorescent lighting in it. Union

officials also succeeded in negotiating the complainant's conditional reinstatement without loss of seniority. During his testimony, Phillips candidly stated the opinion that the incident itself did not warrant discharge. However, he stated that in his opinion, based upon thirteen years of experience as Union Grievance Co-ordinator and based upon his reading of a number of decisions by the permanent umpire under the collective agreement concerning discharge of employees with records of previous suspensions, the complainant's grievance would not likely succeed before the umpire. He also noted that not only did the foreman's version of events which transpired on January 30, 1979 differ radically from the complainant's, but so too did the statement obtained from the complainant's partner, who also blamed the complainant for the breakdown. Accordingly, the decision by the Union to accept a conditional reinstatement in settlement of the grievance instead of proceeding to arbitration was reached only after careful consideration of relevant factors. Thus, the settlement of this grievance through conditional reinstatement of the grievor was accepted by the Union in the honest and reasoned exercise of judgment and did not involve the type of "perfunctory", "not caring" attitude which constitutes arbitrary representation (see *Walter Princesdomu*, [1975] OLRB Rep. May 444).

18. As the Board has noted in many cases, section 60 does not curtail the right of a trade union to settle grievances provided, of course, that it does not act in a manner that is arbitrary, discriminatory, or in bad faith (see, for example, *Jaroslav Rehak*, [1973] OLRB Rep. Sept. 522; and *Wakefield Harper*, [1978] OLRB Rep. July 640). Although it might be preferable from a human relations point of view for a trade union to consult with a grievor before settling his grievance, failure to do so does not *per se* constitute a violation of section 60 since it is the trade union which has carriage of the grievance and it is the trade union which must ultimately decide whether to proceed to arbitration or accept a settlement. As stated by the Board in *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618, para. 26:

"[i]t has been the consistent jurisprudence of this Board that it will not second guess a union in its handling of a particular matter and that [section 60] does not take away a union's right to determine not to proceed to arbitration in a particular case."

Moreover, the Board has recognized that the process of settling grievances through collective bargaining negotiations is not inherently unfair or arbitrary (see *Nick Bachiu*, *supra*).

19. Although Union officials did not contact the complainant to report on the progress of his grievance as often as he wished, it is clear from the evidence that the complainant had frequent discussions at the Union hall and on the telephone with a number of Union officials concerning the status of his grievance and that he was thereby kept informed of the steps being taken to process his grievance.

20. There is no evidence to suggest that the lengthy period of time during which the complainant's grievance remained under consideration resulted from undue delay by the Union. The relatively complex and sophisticated type of grievance procedure set forth in the collective agreement (which covers over forty bargaining units in Canada and the United States) will almost inevitably result in a greater elapse of time between the date of filing a grievance and its final disposition. However, matters such as the number of steps in the grievance procedure and the timing and location requirements for grievance meetings which are to be included in the collective agreement are not matters which could, except perhaps in the most extraordinary circumstances, form the basis of a section 60 complaint.

21. There is also no evidence to suggest that the grievance in the present case was processed more slowly than other grievances. It appears that the Union was continually attempting to resolve the grievance in a manner favourable to the complainant and that when it appeared unlikely that such result could be obtained through the formal grievance and arbitration procedure, the Union attempted successfully to keep the grievance alive so that it might be resolved during negotiations at a time when the Union would have maximum bargaining leverage.

22. In this case, the Union negotiated a settlement with which the complainant is not pleased. However, the mere fact that a complainant does not like a settlement is not sufficient to show a breach of section 60 of the Act (see *Chrysler Canada Ltd.*, (*supra*)). There is no evidence to show that the Union in negotiating this settlement deviated from its usual manner of handling grievances or that the terms of settlement are more onerous than those normally accepted by the Union in similar cases. The evidence establishes that experienced Union officials made a decision based on their knowledge of the facts and their past experience with similar cases.

23. In summary, it has not been proved on the evidence that the Union represented the complainant in a manner which is arbitrary, discriminatory, or in bad faith. Accordingly, the complaint is dismissed.

**2000-79-R Canadian Union of Public Employees and its Local 210,
Applicant, v. The Corporation of the City of Timmins, Respondent, v.
Ontario Public Service Employees Union, Intervener.**

Bargaining Unit – Sale of a Business – Portion of large bargaining unit transferred to municipality – Whether separate bargaining unit or part of municipal unit – Effect of *The Successor Rights (Crown Transfers) Act*

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members H. J. F. Ade and C. Ballentine.

APPEARANCE AT THE HEARING: Gilles LeBel, Orval Turcotte and Normand Bilodeau appearing for the applicant; Corinne Murray and Garth Brillinger appearing for the respondent; and Pauline R. Anidjar appearing for the intervener.

DECISION OF THE BOARD; May 16, 1980.

1. This is an application under sections 2 and 4 of *The Successor Rights (Crown Transfers) Act*, S.O. 1977, c. 30. The purpose of this statute is to preserve bargaining rights and collective agreements that would otherwise terminate on the transfer of an undertaking from the Crown to an employer covered by *The Labour Relations Act*; or from “private sector” employers to the Crown. Transfers of this nature are not covered by the sale of a business sections of *The Labour Relations Act* (see *Municipality of Metropolitan Toronto*, [1975] OLRB Rep. Oct. 777).

2. The relevant provisions of *The Successor Rights (Crown Transfers) Act* are as follows:

“2. – (1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

(2) Where an undertaking is transferred from the Crown to an employer while an application is before the Tribunal for representation rights in respect of employees employed in the undertaking or for a declaration that an employee organization no longer represents employees employed in the undertaking, the application shall be transferred to the Board and the employer is the employer for the purpose of the application as if named as the employer in the application until the Board declares otherwise.

(3) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has been granted representation rights under any Act and has given or is entitled to give written notice of desire to bargain to make or renew a collective agreement in respect of employees employed in the undertaking, the bargaining agent continues, until the Board declares otherwise, to be the bargaining agent in respect of the employees and is entitled to give to the employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement, as the case requires.

4. – (1) Where an undertaking was transferred from the Crown to an employer or from an employer to the Crown and an employee organization, trade union or council of trade unions was the bargaining agent in respect of employees employed in the undertaking immediately before the transfer and,

- (a) a question arises as to what constitutes a unit of employees that is appropriate for collective bargaining purposes in respect of the undertaking; or
- (b) any person, employee organization, trade union or council of trade unions claim that by virtue of section 2 or 3, a conflict exists as to the bargaining rights of the employee organization, trade union or council of trade unions,

any person, employee organization, trade union or council of trade unions concerned may apply to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, and the Board or the Tribunal, as the case requires,

- (c) may determine the composition of the unit of employees referred to in clause a;

- (d) may amend, to such extent as the Tribunal or the Board considers necessary,
 - (i) any bargaining unit in any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of the undertaking, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of the undertaking.

5. – (1) Notwithstanding section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees employed in any of the undertakings applies to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal, as the case requires,

- (a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;
- (b) may determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of such bargaining unit; and
- (d) may amend, to such extent as the Board or the Tribunal considers necessary,
 - (i) any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the undertakings, or

(iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings.”

3. While the evidence is unsatisfactory in some respects, certain basic facts are not in dispute. Prior to January 1, 1980, the Ministry of the Environment ran two sewage treatment plants referred to as the Mitagami River Water Pollution Control Plant, and the Tisdale/Whitney Water Pollution Control Plant. The individuals employed in these facilities were Crown employees bound by a collective agreement between the Crown in Right of Ontario and the Ontario Public Service Employees Union (“OPSEU”). That agreement expired December 31, 1979 and, at the time of the hearing, was being renegotiated. Upon learning of the purported transfer to the City of Timmins, OPSEU sent the City a notice to bargain in respect of its members employed in the subject undertakings.

4. By by-law dated September 24, 1979 the City Council authorized the City officials to enter into a transfer agreement which was annexed to, and formed a part of the by-law. Clause 5 of agreement dealt with the transfer of employees:

“5. (1) The Municipality will offer to employ all those employees of the Crown listed in Schedule ‘B’ in the control, supervision, operation and maintenance of the Works or other sewage or water works of the Municipality.

(2) Subsection 1 does not prevent the Municipality from re-assigning any Crown employee employed pursuant to this section in the same way as other municipal employees are re-assigned to new positions from time to time.

(3) Each Crown employee who accepts an offer made pursuant to subsection 1 shall, subject to the provisions of The Successor Rights (Crown Transfers) Act, 1977, be employed under such terms and conditions of employment as employees of the Municipality may enjoy at the date of termination of the person’s employment by the Crown provided that the terms and conditions of employment shall be not less favourable than those specified in Schedule ‘B’.”

Schedule “B” sets out an elaborate scheme designed to protect the employees’ accrued benefits, and facilitate their integration into the wage and benefits program provided by their new employer. Essentially the agreement binds the City to continue the employees’ established benefits, unless or until those benefits are exceeded by those provided to the City’s existing employees. Schedule “B” was incorporated into a letter from the City to each former crown employee, offering continued employment in accordance with its terms. Those terms are as follows:

“1. A Crown employee accepting employment with the Municipality will, for the purposes of this schedule, become a municipal employee on the effective date of this agreement.

2. SALARIES AND WAGES

On transfers, the employee’s existing rate and range of pay will be protected

where they are higher than those assigned to an equivalent job classification at the Municipality. An employee whose rate and range of pay is protected by this provision will be formally integrated into the Municipality's pay structure when this rate of pay under that structure equals or exceeds his protected rate.

An employee whose rate and range of pay is protected by this provision and who is not at the maximum of his provincial salary range will be eligible to proceed to the maximum of his existing salary range, on the basis of merit, utilizing his provincial anniversary date.

An employee whose rate or range of pay is not protected by this provision will move to an equivalent salary rate, or the next higher rate of pay in the municipality's salary structure on the date of transfer and, if applicable, will maintain his existing anniversary date for the purposes of future merit increases, providing the resultant increase does not exceed 3%. If the increase exceeds 3% the date of transfer will become the employee's anniversary date.

3. VACATION LEAVE

An employee receiving vacation entitlement as a Crown employee at the time of transfer at a greater rate than that allowed under the Municipality's vacation entitlement schedules shall continue to receive entitlement annually at the same rate he received it in his last year as a Crown employee until the Municipality's schedules provide him with an equal or greater entitlement.

Annual vacation entitlement for the year in which the transfer takes place, less any vacation taken from January 1 in that year up to the date of transfer, will be transferred with each transferring employee. Any vacation days over and above such entitlement, existing on an employee's record, will be paid off at the time of transfer. An employee will not be eligible for any further vacation accrual during the calendar year of transfer unless the Municipality's schedules provide a higher rate of entitlement in which case the employee will accrue vacation entitlement for the balance of the calendar year at the rate by which the Municipality's rate exceeds the Crown's rate.

Should an employee resign from the Municipality prior to the end of the year he may have to reimburse the Municipality an appropriate number of days for the period by which his service falls short of the end of the year.

4. OVERTIME, ON CALL TIME, STATUTORY HOLIDAY TIME, SHIFT TIME

All outstanding balances for any of the above will be liquidated by cash payment by the Crown. Negative balances will be collected from any employee so transferring from the employee's final pay.

5. SENIORITY

The Municipality will utilize an employee's existing continuous service date with the province for the purpose of establishing seniority and entitlement to any benefits that flow therefrom.

6. GROUP INSURANCE & HOSPITAL COVERAGES

Any waiting period for employee hospitalization, medical plans and group life insurance will be waived in order to provide immediate coverage under plans provided by the Region. Where the insurance carrier refuses to waive a waiting period or the coverage is less than presently provided by the Crown, the Crown shall maintain any additional coverage for the employee if he desires until such time as the provisions of The Successor Rights (Crown Transfers) Act, 1977 has no further application.

7. PENSION PLAN

The employee's and employer's share of contributions to the Public Service Superannuation Fund will be transferred to OMERS in accordance with the reciprocal transfer agreement existing between the two funds.

The employee will receive a refund of contribution in the Public Service Superannuation Adjustment Fund as no similar provision exists under OMERS.

8. GENERAL

All other benefits and working conditions will be in accordance with the Municipality's arrangements and Collective Agreements except where these terms and conditions are less than those presently enjoyed by the employees. Where this is the case the Municipality will provide the additional benefits and terms for as long as The Successor Rights (Crown Transfers) Act, 1977 applies."

5. As a result of the transfer and the acceptance of the above mentioned offers of employment, the City of Timmins became the new employer of the employees in the two sewage treatment plants. The City of Timmins is currently bound by a collective agreement with the Canadian Union of Public Employees Local 210 ("CUPE") which expires on March 31, 1981. Article 3.01 of that collective agreement provides:

"3.01 Bargaining Unit

The scope of this Agreement shall apply to all employees of the Public Works Department, Parks and Recreation Department, Public Cemeteries, Water Filtration Plants, Animal Control Officers and Maintenance Persons of the Department of Building and Maintenance, all of the City of Timmins, save and except the Works Superintendent, Foremen, persons above the rank of Foreman, and Office Staff Employees."

6. CUPE refers to this agreement as the "outside employee" agreement; although it

will be observed that the recognition clause is not framed in this way, but refers to the employees in certain named departments. George Quirion, the respondent's Director of Public Works and Engineering, explained that "public works" and "engineering" were separate and distinct divisions. The applicant presently represents employees in the engineering division, who work in the water filtration plants. These water filtration plants are different from pollution control plants. The former are designed to provide potable water for domestic and industrial use, while the latter process and treat the water, *after its use*, before it is discharged back into the environment. There are some similarities in the two kinds of facilities; however, the plants themselves serve an entirely different purpose.

7. We are not satisfied on the evidence before us that the sewage plant operators would fall automatically into either the "water filtration plants" portion, or the "public works department" portion of the recognition clause. Accordingly, we cannot conclude that the transfer of the sewage treatment plant operators results in an automatic accretion to the CUPE bargaining unit or raises the kind of conflict with the successor's pre-existing bargaining obligations contemplated by section 4(1) (b) of the Act.

8. There is no interchange or intermingling between the employees covered by the CUPE agreement and the employees in the sewage treatment plants. The respondent has continued to recognize OPSEU as the bargaining agent for these employees, has maintained the pre-existing terms and conditions of employment, and has indicated its desire to negotiate a new collective agreement with OPSEU. The employees, however, have all signed membership cards in CUPE Local 210.

9. CUPE submitted that the employees should be in its "outside bargaining unit", and that, in the circumstances, OPSEU no longer wished to represent them. OPSEU was prepared to consent to a board declaration terminating its bargaining rights, so long as it was clear that until such declaration is made, OPSEU continues to represent the employees, and continues to be entitled to any union dues payable by them.

10. CUPE urges the Board to give effect to the wishes of the employees, and to amend, if necessary, the bargaining unit defined in the "outside workers" agreement. This, contends CUPE, will result in a more rational, consolidated bargaining structure. CUPE argues that the preservation of the sewage plants as a separate unit results in an unnecessary fragmentation of the bargaining structure, and makes no "collective bargaining sense".

11. The City of Timmins relies on the absence of intermingling, the significantly different conditions of the contractual undertakings contained in the transfer agreements, to support its contention that the Board should preserve the status quo. The respondent requests a successor status declaration which maintains the sewage treatment plant as a separate bargaining unit. The respondent argues that if the employees wish to change their bargaining agent, they can make use of the certification process. There are already several CUPE bargaining units and the addition of one more would not unduly complicate the bargaining structure. Over the years through collective bargaining, the respondent has been able to achieve uniformity in conditions and benefits with these various CUPE locals, and the City seeks the same opportunity to "phase in" the new group of employees. A gradual integration was what was contemplated by the transfer agreement. The purpose of *The Successor Rights (Crown Transfers) Act*, contends the respondent, is to *preserve* OPSEU's bargaining rights, not *terminate* those rights or transfer them to CUPE Local 210. There has

been no change in the character of the undertaking so as to permit the termination of bargaining rights pursuant to section 4(2) of the Act; nor has there been any intermingling so as to permit a declaration [under section 5(1) (a) of the Act] that the respondent is no longer bound by a collective agreement, or [under section 5(1) (c) of the Act] that CUPE is the new bargaining agent. The respondent argues that section 4(1) should not be used to extinguish OPSEU's bargaining rights and, in effect, transfer them to CUPE. The respondent notes that the existing collective agreement contains no job classification specific to sewage treatment plant workers.

12. Section 4 of *The Successor Rights (Crown Transfers) Act* is modelled on section 55(4) of *The Labour Relations Act*. The statutory language of the two sections is almost identical; save that section 55(4) refers to the preservation of a "like unit" while section 4(1) (a) is triggered by a question as to what constitutes "a unit of employees that is appropriate for collective bargaining in respect of the undertaking." In this respect section 4(1) (a) is similar to the intermingling provisions of both *The Labour Relations Act*, and *The Successor Rights (Crown Transfers) Act* (i.e. sections 55(6); and section 5 respectively).

13. Section 55 has been part of *The Labour Relations Act* for many years, but it would appear that the issue raised in the present case has never arisen under that statute. Normally, of course, an incumbent union relies upon the successor rights section to preserve rights vis-a-vis a successor employer; or prevent an encroachment on those rights by a trade union which already has bargaining rights for the successor's employees. Here the incumbent union is content to abandon its bargaining rights, and the applicant is urging a restructuring of the bargaining unit so as to create bargaining rights which could not otherwise exist.

14. Under section 55(4) of *The Labour Relations Act* the Board has always tried to preserve the collective bargaining status quo – even though the resulting bargaining structure may be different from what the Board would have determined if the matter had arisen *de novo* on a certification application. In *Loblaws Groceteria's Company Limited* [1973] OLRB Rep. Jan. 73, for example, the Board preserved a union's bargaining rights in a single retail store in Windsor, and declined to redefine the bargaining unit to include all stores in the Municipal area, as it would have done, had the union applied for certification for that single store. The Board observed that,

"the primary purpose of section 55 is to preserve already existing bargaining rights in the event of the sale of a business, and not to give to a trade union bargaining rights it had not previously had".

Similar views were expressed in *The City of Peterborough* [1979] OLRB Rep. Feb. 133. In that case the City had acquired a bus service which had previously been run by an independent franchisee. There was no actual intermingling with other city employees, but there was an apparent conflict of bargaining rights, because CUPE already had an agreement with the city which purported to apply to all city employees. The Amalgamated Transit Union sought to preserve its rights for the transit workers who now worked for the City. The Board treated the matter under section 55(4), and in preserving the ATU's position in the transit operation remarked:

"13. The consistent point of departure in the decisions of the Board in applications under section 55 of the Act is a recognition that the primary pur-

pose of the section is the preservation of employees' bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to an agent not of their choosing. Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all of the criteria that apply to that determination in a certification proceeding it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interest of that employer's existing employees and their union. In the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structures. (*Oshawa Wholesale Ltd.*, [1969] OLRB Rep. Feb. 504; *The Corp. of the City of Kitchener*, [1973] OLRB Rep. June 306; *Yarntex Perth, Division of Yarntex Corporation Ltd.*, [1973] OLRB Rep. Feb. 137).

14. A particular concern in the determination of bargaining units under section 55 of *The Labour Relations Act* is that existing bargaining structures not lightly be interfered with. The Board recognizes the value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication and has come to reflect a workable pattern of mutual expectations between union and employer. Since the promotion of sound collective bargaining relationships is what *The Labour Relations Act* is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time."

Finally, in *Essex County Board of Education*, [1969] OLRB Rep. July 552, the Board contrasted its preservation of the status quo under section 47(a)(3) [now section 55(4)] with its more flexible approach to appropriateness under section 47(a)(5) [now 55(6)] where there is an intermingling or deemed intermingling of employees:

"4. The purpose of section 47a(5) is to avoid that confusion which arises where employees represented by one trade union as their bargaining agent are intermingled with other employees who may or may not be represented by a bargaining agent. Hence, intermingling, whether it is factual or deemed by operation of section 47a(10), is a condition precedent to bringing an application under section 47a(5). Once that condition is satisfied the Board then may exercise its powers under section 47a(5) and section 47a(7). Intermin- gling then becomes one of the factors which the Board considers in determin- ing an appropriate bargaining unit under section 47a(5).

5. Different considerations are taken into account by the Board in deter- mining the bargaining units in applications made under section 47a of *The*

Labour Relations Act and in application for certification. (*Oshawa Wholesale Case, supra.*) Also the considerations applicable under sections 47a(2) and (3) differ from the considerations applicable under section 47a(5). Sections 47a(2) and (3) require a determination based on a “like bargaining unit” whether or not the same is appropriate. In applying sections 47a(2) and (3) the Board has stated:

‘The [Board] must take into account, and in large measure be governed by, the scope of the bargaining unit already in existence.’

Oshawa Wholesale Case, supra. However, in applying section 47a(5) a determination is based on the appropriate bargaining unit.

6. We are further of the opinion that the considerations applicable to determining the appropriate bargaining units pursuant to section 47a(5) may differ from the considerations applicable in determining the ‘unit of employees that is appropriate for collective bargaining’ pursuant to section 6(1). For example, preservation of bargaining rights, a factor which may not exist under section 6(1) may be a factor in considerations pursuant to section 47a(5).”

15. The established jurisprudence under section 55(4) overwhelmingly supports the preservation of the existing bargaining structure, unless there is an intermingling or deemed intermingling of the employees. It must be recognized however, that in cases such as *City of Peterborough, supra* this “presumption” in favour of the status quo, is based upon the transfer, *in toto*, of a pre-existing (and presumptively *be vial*) bargaining unit – not a tiny fragment of a unit as in the present case. In addition, under section 4 of *The Successor Rights (Crown Transfers) Act*, as under section 55(6) of *The Labour Relations Act*, the Board is required to determine an “appropriate” bargaining unit. Bargaining history is only one factor to be considered in making this determination, and the use of the term “appropriate” suggests broader discretion than is expressed by the Board under section 55(4) of *The Labour Relations Act*.

16. There is no established jurisprudence under section 4 of *The Successor Rights (Crown Transfers) Act* nor did the Board support a presumption in favour of the status quo, in the only case under that section to mention the issue. In *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445 at para. 18, the Board commented:

“18. In this case we have an undertaking being moved from the government sector to what might be called a quasi-public sector. The Crown has relinquished its role of employer and has given it to a public hospital board. Of even more significance is the fact that the collective bargaining structures existing in the two sectors are completely different. It should not be surprising, therefore, that the provisions of *The Successor Rights (Crown Transfers) Act*, 1977, contain no reference to ‘the like bargaining unit’ as does section 55 of *The Labour Relations Act*. Where transfer between sectors occurs there can be no presumption, such as was made in *Oshawa Wholesale Ltd., supra*, that existing bargaining units will continue in their same form. In the Board’s view, the presumption is the opposite – that existing bargaining units

must be adapted to fit the bargaining structure of the sector that they have just entered. To take the other approach would be to create an anomalous and unwieldy bargaining structure that would defy all common sense.”

The Board noted that *The Crown Employees Collective Bargaining Act* prescribes a single, comprehensive, province-wide unit, embracing all public servants. The statutory framework, bargaining environment, and dispute settlement mechanisms are quite different from those which exist in the private sector. It cannot be assumed that a fragment of this province-wide bargaining unit, when transferred to the private sector, will necessarily reflect a single community of interest, or be entirely appropriate in its new context. The previous bargaining history is much less significant than it is under *The Labour Relations Act*.

17. The actual decision in *Owen Sound General & Marine Hospital* was based upon the existence of intermingling, and the discretion given to the Board under section 5 of the Act. This was also the basis of the Board’s decision in *Regional Municipality of Halton*, [1978] OLRB Rep. Aug. 750 which was relied upon by the applicant. In that case two sewage treatment plants had been transferred from the Crown to Halton and employees were intermingled with those of the successor. The trade union representing the successor’s other employees affirmatively demonstrated that the newly transferred employees would fall within the scope of its existing collective agreement with the successor, and the parties were in agreement that there should be a single bargaining unit, described as in that agreement. There was no dispute concerning the bargaining structure. Having regard to the small number of employees who were transferred, the Board declined to hold a representation vote, and simply declared that all of the employees were bound by that agreement. In the present case there is no intermingling, and the respondent’s new employees would not automatically fall within the scope of the applicant’s existing agreement. The circumstances of the present case are clearly distinguishable from those in *Owen Sound General & Marine Hospital* or *Regional Municipality of Halton*. Neither provides a firm guideline for the disposition of the present case.

18. We are satisfied that the use of the term “appropriate” in section 4(1)(a) suggests a broad discretion to make an objective determination of the appropriate bargaining structure. We also adopt the view of the Board in *Owen Sound General & Marine Hospital* that there is no presumption in favour of maintaining the status quo, as there would be under section 55(4) of *The Labour Relations Act*. Both of these conclusions support CUPE’s contention. There are however, equally weighty countervailing considerations which militate against acceptance of the applicant’s position.

19. The purpose of the successor rights legislation is to preserve, rather than extend, extinguish or transfer bargaining rights. We do not think it was intended that section 4(1)(a) could be used for the purpose suggested by the applicant. It will be observed that, in contrast to sections 4(2) and 5 of the Act, section 4(1) contains no language respecting the termination of bargaining rights or a declaration as to which of two unions is the bargaining agent for the transferred employees. Had the legislature intended the Board to exercise such powers, it could have easily so specified in language similar to that used in section 5. The failure to do so suggests that the legislature envisaged a more limited role for the Board in applications under section 4. It is also unusual, in our view, to suggest that the “unit of employees appropriate for collective bargaining in respect of the undertaking” should be defined so as to encompass a large body of employees, represented by another bargaining agent, in another,

and wholly separate, bargaining unit – especially where, as here, there is no intermingling and the result would be to extinguish the bargaining rights of the incumbent union. The municipal employees are bound by their own collective agreement which was negotiated prior to the transfer, and does not contemplate an accretion of the kind now proposed by the applicant. The terms and conditions of the sewage plant operators are significantly different from those of the municipal employees, and to include them in the CUPE agreement could effectively undermine the guarantees which the Crown sought on their behalf to preserve. Finally, we are not satisfied that the preservation of the collective bargaining status quo results in a wholly irrational or entirely unworkable bargaining structure. The respondent's present bargaining structure is not a model of rationality and symmetry. It is already highly fragmented, yet the parties have been able to achieve uniformity of conditions through the process of collective bargaining. There is no reason why a similar accommodation cannot be reached vis-a-vis the transferred employees; and if those employees wish to change bargaining agents they are permitted to do so pursuant to the certification provisions of the Act, when such application is timely.

20. For the foregoing reasons, the board declares that:

- (a) the respondent, the Corporation of the City of Timmins, is a successor employer pursuant to the provisions of *The Successor Rights (Crown Transfers) Act* S.O. 1977 c. 30; and
- (b) the intervener, Ontario Public Service Employees Union, continues to represent the employees of the sewage treatment plants herein mentioned, and is entitled to bargain collectively on their behalf.

1469-79-R International Union of Operating Engineers Local 793,
(Applicant), v. **Corporation of the Town of Meaford**, (Respondent).

Bargaining Unit – Certification – Cemetery and parks operated by Boards established by statute – Whether employees of municipality or of Board – *The Cemeteries Act* and *The Public Parks Act* considered.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: Jack Redshaw for the applicant; Donald F. Hersey and Susan A. Bisset for the respondent.

DECISION OF THE BOARD; May 15, 1980.

1. This is an application for certification in which the applicant has applied to be certified to represent a unit of employees of the Corporation of the Town of Meaford. At issue is the question of whether certain employees working at the Lakeview Cemetery and the Meaford and St. Vincent Community Centre, both of which are located in the Town of Meaford, are employees of the Town.

2. As contemplated by section 68 of *The Cemeteries Act* the Lakeview Cemetery is vested in, and managed by, the Board of Park Management of the Town of Meaford. The Board of Park Management was established pursuant to the provisions of *The Public Parks Act*. Section 4 of that Act deems the Board of Park Management to be a corporation. Section 8 authorizes the Board to “employ all necessary clerks, agents and servants”, and also provides that the Board may prescribe the duties and compensation of employees. Section 1(7) of the Act stipulates that when a Board of Park Management ceases to exist, “every officer and employee of the Board of Park Management *becomes* a municipal employee and continues as such until removed by the Council” (emphasis added). On the basis of these statutory provisions, we are satisfied that so long as it continues to exist, the Board of Park Management is an employer independent of the Town of Meaford, and accordingly, employees of the Board of Park Management working at the Lakeview Cemetery are not employees of the Town of Meaford. In this regard see *The Board of Park Management of the City of Belleville*, [1974] OLRB Rep. April 219.

3. The Meaford and St. Vincent Community Centre is operated by the Committee of Management of the Meaford and St. Vincent Community Centre. The relevant statute here is *The Community Recreation Centres Act* which empowers a municipality to appoint a committee for the management and control of a community centre. The Act contemplates that actual ownership of the centre will remain with the municipality. The Act does not deem a committee of management to be a corporation, nor does it refer to such a committee as having employees of its own. A reading of the Act as a whole satisfies us that the purpose of a committee of management is simply to manage the day-to-day affairs of a community centre on behalf of a municipality, and that such a committee has no separate legal status as an employer separate and apart from the municipality which creates it.

4. The evidence indicates that the Town of Meaford treats the Committee of Management of the Community Centre in much the same way as it does the Board of Park Management. According to Mr. Floto, the Meaford Town Clerk, the Committee alone is responsible for hiring employees and for setting their conditions of employment. To our mind, this situation reflects only the fact that the Town has seen fit to give the committee a wide degree of discretion which, by itself, cannot have the effect of creating the Committee as a separate employer in its own right.

5. The Meaford and St. Vincent community Centre is named after the Town of Meaford and the nearby Township of St. Vincent. The Town owns the land on which the community centre is located, and presumably is also the sole owner of the centre. The township, however, paid twenty-five per cent of the initial capital cost of the community centre and contributes twenty-five per cent of its operating costs. In return, residents of the Township are entitled to use the community centre, and the Township selects two of the seven members on the Committee of Management. This type of arrangement between the two municipalities is contemplated by section 4 of *The Community Recreation Centres Act*. These facts raise the question of whether the two municipalities might be viewed as joint employers of employees working at the community centre. On the material before us, however, particularly Bylaw 4-79, enacted by the Town of Meaford and the terms of the formal agreement entered into between the two municipalities, it appears that the Committee of Management is a creation only of the Town of Meaford and that the Meaford Town Council formally appoints all seven of its members, albeit that two represent and are selected by the Township of St. Vincent. Apart from selecting two of the committee members to be appointed by the

Town of Meaford, the Township's involvement appears simply to be that of making payments towards the capital and operating costs of the community centre in return for ensuring its residents can make use of its facilities. In our view, this is not sufficient to make the Township a joint employer with the Town. Accordingly, we are satisfied that employees working at the community centre are employees only of the Town of Meaford.

6. At the hearing, Board Member Hodges twice raised the issue of the applicability of section 1(4) of the Act to the facts of this case. Section 1(4) permits the Board under certain circumstances to treat one or more corporations as constituting a single employer for the purposes of the Act. On both occasions the representative of the applicant stated that he was not seeking to have the Board apply section 1(4).

7. Having regard to all of the above, we are satisfied that employees at the Meaford and St. Vincent Community Centre are employees of the respondent, but that persons working at the Lakeview Cemetery are not. The respondent is directed to file an amended list of bargaining unit employees which includes those working at the community centre.

1813-79-U United Steelworkers of America, Complainant, v. Cross Tube Products Inc., Respondent.

Duty to Bargain in Good Faith – Employer taking firm position on union security, seniority and management rights – Union demanding compulsory check-off – Whether violating section 14

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Martin Levinson and J. Fitzpatrick for the complainant; Philip J. Wolfenden and Len Jones for the respondent.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER H. J. F. ADE; May 12, 1980.

1. This is a complaint under section 79 of *The Labour Relations Act* which alleges that the respondent has violated sections 14, 56, 58 and 61 of the Act. At the hearing the complainant restricted its submissions to the alleged violation of section 14, contending that the respondent had failed to bargain in good faith and make every reasonable effort to make a collective agreement.

2. The complainant trade union was certified to represent a unit of the respondent's employees on September 27, 1979. On October 1, 1979 Mr. John Fitzpatrick, a representative of the complainant, served a written notice to bargain on the respondent. The respondent's officials had never before been involved in dealing with a trade union and retained the services of Mr. David Brisbin, a solicitor experienced in labour relations matters.

3. On October 9, 1979, Mr. Brisbin wrote to Mr. Fitzpatrick to inform him that he

had been retained by the respondent and to invite suggested meeting dates to commence negotiations. In his letter Mr. Brisbin also made the following request:

“I am also requesting on behalf of the Company and pursuant to Section 70 of the Ontario Labour Relations Act for your permission to institute interim wage increases for employees in the bargaining unit that your Union now represents.

The employees have been without a general increase for some time and, having regard to the realities of negotiating a first Collective Agreement, it may be some time before such an increase would be forthcoming.

I realize, of course, that this request on behalf of the Company and your hoped for permission would be without prejudice to either party in wage and/or benefit discussions at the bargaining table.

The proposed increase to the bargaining unit is an across-the-board interim increase of 7%.”

4. Following the sending of this letter a number of telephone conversations ensued between Mr. Fitzpatrick and various persons in Mr. Brisbin's office as attempts were made to reach agreement on a date to commence negotiations, and also with respect to the company's request that it be permitted to institute a 7 per cent wage increase. In one of these telephone calls which took place on a Friday, Mr. Brisbin indicated that the company would like to implement the wage increase as soon as possible. For his part, Mr. Fitzpatrick replied that if the company sat down with him the following Monday and agreed to a union security provision and the implementation of weekly sick pay benefits he would meet with the bargaining unit employees and get them to agree to the 7 per cent increase. The respondent did not take up Mr. Fitzpatrick's offer. Mr. Brisbin explained the respondent's action in this regard by stating that he had not wanted to get involved in “pre-bargaining” with the respondent.

5. Initially, there was some difficulty in arranging for a date to open negotiations. Mr. Fitzpatrick desired a date in the week commencing Monday, October 29, 1979. For his part, however, Mr. Brisbin stated that because of other commitments he would be unable to meet with the complainant until the week commencing Monday, November 12th. Eventually Mr. Brisbin freed himself of his commitments on Monday, November 5th, and the parties agreed to meet on that date.

6. Prior to November 5th, Mr. Fitzpatrick forwarded to the respondent the complainant's proposed terms for a collective agreement. The proposal indicated the union's desire for “a substantial wage increase” but made no mention of any specific amount. The meeting on November 5th lasted for about an hour, and consisted primarily of Mr. Brisbin questioning Mr. Fitzpatrick concerning certain aspects of the complainant's proposals. At the end of the meeting, Mr. Brisbin indicated that the respondent would require some time to prepare a reply to the complainant's proposals, and suggested that the parties meet again on November 26, 1979. Mr. Fitzpatrick objected to waiting until November 26th, leading Mr. Brisbin to reply that although he had already planned something else for November 19th, he would be prepared to meet on that date. The parties then agreed to meet on November 19th and to hold open November 26th for a possible future meeting.

7. On Friday, November 16, 1979, Mr. Brisbin had the respondent's reply to the complainant's proposals delivered to the complainant's offices. The respondent's proposals took the form of a draft collective agreement covering all non-monetary items. A number of the clauses proposed by the respondent were either the same as, or very similar to, the clauses earlier proposed by the complainant.

The parties met as arranged on November 19th. In the morning Mr. Brisbin was not in attendance, although another solicitor from his office, Mr. P. Wolfenden, was present. The parties proceeded to discuss in detail the respondent's proposals. Approximately forty clauses proposed by the respondent were accepted by Mr. Fitzpatrick for inclusion in a final collective agreement. With respect to approximately twelve other clauses, Mr. Fitzpatrick indicated that he could not agree with the respondent's proposal as worded, and that some modifications would be required. In addition, Mr. Fitzpatrick made it very clear that he found three of the respondent's proposals completely unacceptable, namely its proposals with respect to management rights, seniority and union security.

9. Both the complainant and the respondent were in agreement that the collective agreement should contain a management's right clause which, subject to the other terms of the agreement, would permit the respondent to hire, promote, demote, lay off and discipline employees for just and reasonable cause. The respondent, however, proposed to also include a number of other specific management rights, most, if not all of which, would appear to be implicit in the union's proposal.

10. The differences between the parties on the matter of seniority were somewhat more fundamental. At the bargaining table Mr. Fitzpatrick made it clear that he would be agreeable to almost any clause which entitled a more senior employee to a job provided he had the ability to do the work involved. For its part, however the respondent proposed a system whereby seniority would be a governing factor only where the knowledge, efficiency, ability, physical fitness and reliability of competing job applicants were approximately equal. Mr. Fitzpatrick objected to this proposal on the basis that it would result in a "competition" between employees after the same job, and that to support one employee the union would be required to "knock down" another employee.

11. Clearly the most important of the three major issues in dispute as far as Mr. Fitzpatrick was concerned was the issue of union security. The complainant originally proposed a "Rand Formula" whereby the respondent would deduct from the pay of each employee in the bargaining unit union dues, fees and assessments as prescribed by the complainant's constitution. The respondent for its part, proposed only the voluntary payment of union dues. During the morning of November 19th, Mr. Fitzpatrick made the statement that the policy of the complainant union was not to agree to a voluntary checkoff.

12. Mr. Brisbin arrived at the scene of the negotiations during the luncheon recess on November 19, 1979 and was briefed on the morning's developments by Mr. Wolfenden. Both Mr. Brisbin and Mr. Wolfenden attended at the afternoon session with Mr. Brisbin acting as the respondent's spokesman. There was a considerable degree of discrepancy between the testimony of Mr. Fitzpatrick and Mr. Brisbin concerning what happened on the afternoon of November 19th. We are satisfied, however, that shortly after the afternoon session began, Mr. Brisbin made it clear that the respondent was taking a strong stand with respect to the three major issues in dispute, stating that they had not been raised as a "smokes-

screen". For his part, Mr. Fitzpatrick indicated that the union was equally firm in its position. In particular, Mr. Fitzpatrick made it clear the the complaint would not accept a form of voluntary dues check-off. Mr. Brisbin testified that he "believed" that; there then followed a discussion concerning the reasoning behind each side's position on union security. According to Mr. Brisbin, Mr. Fitzpatrick justified the complainant's position on the grounds that it was responsible for representing all employees in the bargaining unit, and because it wanted to avoid pitting employees against each other. For his part, Mr. Brisbin testified that he stated that the respondent felt that union support was not the respondent's business, and that each employee should make his own decision about being a member of the union. In cross-examination, Mr. Fitzpatrick indicated that he had not outlined the reasons for the complainant's position on the three main issues in dispute and that he could not recall whether Mr. Brisbin had offered any explanation for the respondent's position on union security. At one point during the afternoon of November 19th, Mr. Fitzpatrick stated that the respondent was no better than Radio Shack, and was bargaining in bad faith. The reference to Radio Shack was doubtless to the *Radio Shack* case, (File No. 1004-79-U, decision dated December 5, 1979) which was at the time still before the Board. Mr. Fitzpatrick also made the comment that by the time the parties completed their negotiations the Legislature would likely have made dues checkoff compulsory.

13. About mid-way through the afternoon of November 19th, Mr. Fitzpatrick made the statement that he was ready to make a new proposal on union security so as to show that the complainant was prepared to make a settlement. Mr. Fitzpatrick stated that he would accept a "maintenance of membership" provision with a requirement that all new employees pay union dues. Mr. Fitzpatrick then asked Mr. Brisbin what he proposed. According to Mr. Fitzpatrick, Mr. Brisbin replied that he was not authorized by his client to go further than was in the respondent's written proposal. Mr. Fitzpatrick added that he suggested that the respondent's position on the main issues was non-negotiable, which led to the discussion becoming more heated and Mr. Brisbin finally commenting, "if you want to put it that way it's non-negotiable". For his part, Mr. Brisbin testified that he did not use the phrase, "non-negotiable", adding that it would be a "stupid" thing for him to say. Mr. Brisbin also doubted the claim that he had said that he was not authorized by his client to go any further, particularly since the respondent had given him a wide degree of discretion in negotiating non-monetary issues. Mr. Brisbin did acknowledge, however, that he had stated that the respondent was firm on the three main issues. The respondent never did make any move in response to Mr. Fitzpatrick's altered proposal with respect to union security.

14. At about 2:30 p.m. on November 19th, Mr. Fitzpatrick stated that the respondent was not bargaining in good faith and he proposed a recess in the talks so as to allow Mr. Brisbin to talk to his clients. Approximately fifteen or twenty minutes later the parties met again, at which time Mr. Brisbin indicated that the respondent remained firm in its positions, although he was prepared to review with Mr. Fitzpatrick clause by clause those areas relevant to the three main issues in dispute. For his part, however, Mr. Fitzpatrick indicated he felt that what was important was the principles involved and that discussion should be limited only to the principle of each area of concern.

15. After the parties had repeated their positions they sat there for some minutes without anyone speaking. Mr. Brisbin then commented that he though there was not much purpose in continuing the meeting that day. For his part, Mr. Fitzpatrick indicated that the complainant would be applying for conciliation and perhaps also filing a complaint with the

Board. The parties had previously agreed to leave open November 26th for a possible future meeting, but as the meeting of November 19th broke up, the unspoken understanding seemed to be that the parties would not be meeting on that day. In giving his testimony, Mr. Fitzpatrick testified that Mr. Brisbin had indicated that until such time as the complainant agreed to the respondent's position, there would be no negotiations and no monetary offer. In cross-examination, Mr. Fitzpatrick stated that this is only what he understood from Mr. Brisbin's comments. On all the evidence, including the testimony of Mr. Brisbin and Mr. Jones, the respondent's plant manager, we are led to conclude that neither Mr. Brisbin nor Mr. Fitzpatrick actually raised the question of a monetary offer on November 19th. Indeed it appears that at the time both gentlemen were content to leave aside monetary issues and concentrate only on "language" matters.

16. Following the meeting of November 19, 1979, the complainant asked for the appointment of a conciliation officer. The parties met together with a conciliation officer on January 31, 1980. In the presence of the conciliation officer, the parties agreed upon what were the outstanding issues and both sides indicated that they were firm on their positions. The conciliation officer then met with the parties separately. Shortly after lunch the officer broke off conciliation. Neither side appears to have altered its position during conciliation.

17. Counsel for the complainant contended that the respondent had violated its duty to bargain in good faith because:

- 1) the quality of discussion by the respondent of the complainant's proposals was below acceptable standard, and
- 2) the respondent had indicated that it was not prepared to negotiate monetary or other issues in dispute until the three main issues had been resolved.

18. It is to be noted that counsel for the complainant did not allege that the positions advanced by the respondent *per se* indicated that it was bargaining in bad faith. From Mr. Fitzpatrick's comments at the bargaining table, one gathers that at least with respect to the union security issue he felt the respondent's position to be indicative of bad faith bargaining. Mr. Fitzpatrick clearly feels strongly about the need for a fairly strong union security provision in a collective agreement. However, *The Labour Relations Act* makes mandatory only a voluntary checkoff provision in a collective agreement if such is requested by the union. Any change to this situation would require an amendment to the Act by the Legislature. (For a discussion of the issue of union security as a negotiable issue see *The Daily Times*, [1978] OLRB Rep. July 604). In the *Radio Shack* case, *supra*, the Board did conclude that the position of the employer before it with respect to union security was unlawful and directed that the employer move off of its position. In that case, however, the employer's position on union security was part and parcel of a long-standing scheme to undermine the role of the union as the employees' exclusive bargaining agent, something which was neither alleged by the complainant in this nor established by the evidence led before us.

19. As noted above, counsel for the complainant alleged that the quality of discussion by the respondent of the complainant's demands was below an acceptable standard. With respect to this allegation he referred to the Board's decision in *Wellington-Dufferin-Guelph Health Unit*, [1979] OLRB Rep. Nov. 115 wherein the Board stated that section 14 requires

that there be “a significant commitment of time, effort and energy” in the pursuit of a collective agreement, to the Board’s decision in *Canadian Industries Limited*, [1976] OLRB Rep. May 199, where the Board stated that there must be “full and free discussion” during negotiations, as well as to *De Vilbiss (Canada) Limited*, [1976] OLRB Rep. March 49, where the Board concluded that the duty to bargain under section 14 “is intended to foster rational, informed discussion thereby minimizing the potential for unnecessary industrial conflict”.

20. In our view, the respondent has established that it was prepared to make a commitment of time and effort to effect a collective agreement. Although initially there was some difficulty in getting the respondent’s solicitor to free up dates for negotiations, mutually acceptable dates were finally agreed to. In addition, it is clear that prior to the meeting of November 19th, officials of the respondent put a good deal of work into preparing the respondent’s proposals. As already noted, in the morning of November 19th the complainant agreed to some forty clauses proposed by the respondent.

21. As for the requirements of “full and free discussion” and “rational and informed discussion”, it appears that with respect to the issues raised at the bargaining table, the respondent was prepared to justify its own positions and to listen to whatever argument were advanced by the complainant. At no time did the respondent refuse to listen to the complainant’s representative, or request by the complainant that it continue discussions. If Mr. Brisbin did, in the midst of a heated argument, make the comment that the respondent’s position on the three main issues was “non-negotiable”, in the circumstances the only reasonable interpretation to be placed on the statement was that the respondent was not prepared to alter its position. At all times the respondent clearly acknowledged that management rights, seniority and union security were proper subject matters for negotiation, and it did discuss them, albeit that it took a very firm position with respect to each of them. As indicated by the following excerpt from *The Daily Times* case, however, section 14 of the Act does not go so far as to preclude a party from taking a firm position in bargaining:

“The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses.”

Taking all of these considerations into account, we are not satisfied that the quality of discussion on the part of the respondent fell below a minimally acceptable level.

22. We turn now to consider the second ground advanced by counsel for the complainant, namely that the respondent violated section 14 by not being prepared to negotiate money or the other items in dispute until the three main items in dispute were resolved. It was counsel’s contention that the respondent was required to negotiate with respect to all issues.

23. The general practice in negotiations is to settle all or at least the great majority of non-monetary items before discussing monetary ones. Here the complainant made no monetary demands and never asked the respondent to make a monetary proposal. At all relevant times the complainant appeared to be content to deal only with non-monetary items while leaving the monetary items until later. The same is true with respect to non-monetary items other than the three major issues. Neither side appeared to view the twelve or so is-

sues involved as being major obstacles to a final settlement, and accordingly both were prepared to leave them aside while dealing with the three major issues. The complainant did not even ask the respondent to go back to deal with these issues a second time after they had been identified on the morning of November 19th.

24. Mr. Brisbin's indication on the afternoon of November 19th that he saw no usefulness in proceeding further appears to have been predicated on reasonable belief that neither side wanted to discuss any other matters until the three major issues were settled. Mr. Fitzpatrick did not, either before or after Mr. Brisbin's comments, indicate a desire to leave the three issues unresolved and move on to other matters. This being the case, it cannot be said that the respondent refused to negotiate with respect to these other matters.

25. Having regard to the foregoing, the complaint is hereby dismissed.

DECISION OF BOARD MEMBER C. A. BALLENTINE:

1. With all due respect I disagree with the majority decision. On the evidence submitted it is clear that the respondent, through its lawyer Mr. Brisbin, frustrated the applicant's endeavour to reach a first agreement.

2. As the majority stated, the applicant had a difficult time in arranging a date for the first meeting. The union was certified September 27, 1979, but the first meeting was not until November 5th, notwithstanding that the respondent indicated that it was concerned about putting into effect a seven per cent increase to retain its labour force. At the November 5th meeting, Mr. Brisbin suggested that the next meeting take place on November 26th. After an objection by the union, a meeting was scheduled for November 19th. At the November 19th meeting an impasse took place on three issues, although a good number of clauses were tentatively agreed to. The three issues were management rights, seniority and union security in the centre.

3. I sincerely believe that the union security issue is the key issue to this case. Mr. Fitzpatrick gave evidence that Mr. Brisbin took the position that unless the union agreed to the company's wording on the three issues, negotiations would not continue. On the other side, Mr. Brisbin gave evidence that he stated to Mr. Fitzpatrick that the company was firm on the three issues.

4. In examination-in-chief, Mr. Brisbin told the Board that he arrived at the November 19th meeting after lunch and took over from Mr. Wolfenden as spokesman after being briefed by Mr. Wolfenden to the extent of the morning negotiations. He stated, "I told Mr. Fitzpatrick that the three areas are not a smokescreen, company is not going to provide compulsory checkoff, it's up to each member to make up his own mind". Under cross-examination the complainant's lawyer questioned Mr. Brisbin:

Q. "After lunch did you talk about union security? I take it Fitzpatrick altered his position to a maintenance shop. Fitzpatrick said now what's your position, do you remember that?"

A. I don't think it was a change.

Q. Did you say to the effect you were firm on the three issues?

A. Yes, I said that it wasn't window dressing.

Q. Did you say not authorized to go further on the document?

A. No, I don't think I did, I would be surprised if I said issues not negotiable, no, didn't say union security not negotiable, I think I said in view of the parties' position there wasn't much use in continuing. I am sure I said we were firm on the three areas before the break.

Q. Do you recall Fitzpatrick saying, you'd better go back with your clients, as you are bargaining in bad faith?

A. Could have.

Q. Do you recall before breaking you said not authorized to go further?

A. I may have used those words."

From the above evidence by Mr. Brisbin it is clear that he used a number of phrases to give the union a clear understanding that the company was not prepared to move off its position on the language of the three areas, i.e., *firm, not a smokescreen, not window dressing*. Regardless of how it was said, Mr. Fitzpatrick could only take one meaning and one meaning only, that is unless the union would consent to a "voluntary checkoff" there would be no further negotiations.

5. The union's first position on union security was the Rand Formula. The company countered with a voluntary checkoff, and stood pat. The union modified its position when the company took a firm position on the three areas. The union offered a "maintenance of membership", and that is that existing union members would remain members and that a part from such members only new employees would be required to pay union dues through checkoff. Under cross-examination, Mr. Len Jones, the respondent's plant manager, in answering a question by the complainant's counsel, stated "yes, he (Fitzpatrick) said he would take a maintenance of membership checkoff". Mr. Brisbin was not present at the hearing when Mr. Jones gave evidence, but gave his evidence after Mr. Jones. In cross-examination, Mr. Brisbin indicated that he did not regard Mr. Fitzpatrick's change in position on union security to be a real change, and then added, "our signals may have been crossed". Mr. Brisbin is a skilled negotiator, surely he understands the various union security schemes. Mr. Justice I. C. Rand, in his arbitration award dated January 29, 1946 cited the different union security systems:

(1) 'Union shop with checkoff' permits the employer to engage employees at large, but requires that within a stated time they join the union or be dismissed if they do not.

(2) 'Closed shop' only a member of the union can be originally employed ... [Practice in many industries, i.e., construction].

(3) 'Maintenance of membership' is a requirement that an employee member of a union maintain that membership as a condition of continuing em-

ployment for a stated time, generally the life of an agreement. In this, there can be modifications.”

Mr. Justice Rand awarded the U.A.W. at the Ford Auto Company at Windsor, Ontario “compulsory checkoff of union dues from wages of all workers under the agreement whether union members or not”. This award has become known as the Rand Formula.

If there was any misunderstanding as to whether the union moved off the Rand Formula position, this would have been clarified by the conciliation officer at the conciliation meeting January 31, 1979.

6. Paragraph 21 of the majority decision states “section 14 of the Act does not go so far as to preclude a party from taking a firm position in bargaining” relying on the following excerpt from the *Daily Times* case, [1978] OLRB Rep. July 604:

“The parties to collective bargaining are expected to act in their individual *self interest* and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses.”

[emphasis added]

Management rights and seniority are clearly legitimate issues for management to be concerned about; *but union security is not*. Mr. Justice I. C. Rand had this to say on this subject:

“I see no special interest of the employer as such in these possible dangers and in the present state of things, those who control capital are scarcely in a position to complain of the power of money in the hands of labour.”

The respondent’s firm position on management rights and seniority is “hard bargaining” and, as such, is not a violation of section 14, but for the company to take a rigid position on union security and stonewall the union is “surface bargaining” and constitutes bargaining in bad faith.

7. Paragraph 18 of the majority decision refers to the *Radio Shack* case and states, “the Board did conclude that the position of the employer before it with respect to union security was unlawful and directed that the employer move off its position. In that case, however, the employer’s position on union security was part and parcel of a longstanding scheme to undermine the role of the union as the employees’ exclusive bargaining agent, something which was neither alleged by the complainant in this case nor established by the evidence led before us”. Does it make it less of a violation of section 14 if the company is more subtle and sophisticated? I refer to paragraph 87 of *Radio Shack*:

“87. To the extent that absolute rigidity is inconsistent with good faith bargaining and reasonable effort, it should be clear from our reasoning above that we are of the view that an employer can be no more rigid and unbending on union security than he can be on any other issue. Section 36a simply provides the union with a very limited form of union security as a matter of right. Any other form of union security is still clearly negotiable and, thus, an employer’s bargaining obligation remains unchanged. Indeed, the very fact that

the Legislature thought it necessary to enact section 36a conveys a statutory recognition of how important this issue is to trade unions and the problems associated with employer opposition. It would therefore be strange for this Board to interpret the presence of a provision benefiting trade unions to some limited degree in a manner which would encourage employer resistance and thereby exacerbate collective bargaining conflict in relation to this very sensitive issue. The issue is easily manipulated by an employer intent on undermining the exclusive role of a certified bargaining agent arising as it does in first agreement controversies. The Board must therefore judge bargaining with this fact clearly in mind."

However, paragraph 86 of the *Radio Shack* decision stated: "It is simply wrong to conclude that offering what the statute requires as a bare minimum in the area of union security cannot be held to constitute bargaining in bad faith. Standing alone this may be the case."

8. The decision of the majority in the instant case has taken the position taken in *Radio Shack* as absolute, notwithstanding that the union in the instant case modified its position, and still the company remained in a rigid position. The amendment to the Act in 1975 extended the Board's remedial jurisdiction under section 79 to include orders and directions and has resulted in a number of landmark equitable decisions, e.g., *Radio Shack*. However, the majority decision, taking *Radio Shack* into consideration, suggests *that the Board will not find that the union security issue standing alone constitutes bargaining in bad faith*. Although I disagree with the majority decision, it is obvious that the only course the unions have open to them is to demand a change in the Act to accomplish any equality in collective bargaining for a first agreement. The majority decision in paragraph 18 addressed itself to this issue, "*The Labour Relations Act* only makes mandatory a voluntary checkoff provision in a collective agreement if such is requested by the union. If this situation is to be changed, it would require an amendment to the Act by Legislature."

9. In 1946, thirty-four years ago, Justice I. C. Rand in his precedent setting award said, "the social desirability of the organization of workers and of collective bargaining where employees seek them has been written into law. I consider it entirely equitable then that all employees should be required to shoulder their position of the burden of expense for administering the law of their employment, the Union contract: that they must take the burden along with the benefit." Section 60 of the Act places a legal obligation on the trade union to fairly represent all employees of the bargaining unit whether members of the union or not. Why should not all employees in the bargaining unit carry their share of the financial costs of that representation?

10. There have been a chain of bitter confrontations (strikes) on the issue of union security in first contract negotiations in Ontario. It seems a pattern has emerged of companies taking a rigid position against the checkoff of union dues early in negotiations, sit pat, then endeavour to legitimize that rigid position by relying on section 36a-(1) (voluntary remittance of union dues). First contracts account for less than ten per cent of all labour bargaining in Ontario every year, but generate almost a third of all strikes. Further, one new bargaining unit in four simply collapses instead of striking. The decision of the majority in this case adds the employees of Cross Tube Products Inc. to these unfortunate statistics. Will they ever be able to avail themselves of the right of union representation which they believe the preamble of the Act assured them of?

11. The decision should have been that the respondent violated section 14 by taking a rigid position on union security and failed to bargain in good faith and make every reasonable effort to make a collective agreement. The parties shall resume collective bargaining and further, the respondent shall cease and desist from resiting the union's position of a maintenance of membership union security provision in the collective agreement.

12. In view of the majority decision prevailing as the decision of the Board, and in view that my decision will not contribute to a collective agreement for the thirty-three employees of the respondent, it is my opinion that the Legislature of Ontario should take cognizance of this serious inequity in industrial relations and should amend section 36a of the Act to accomplish a compulsory form of remittance of dues by the employer. Four provinces of Canada, namely, Quebec, Manitoba, Saskatchewan and British Columbia have compulsory dues checkoff legislation, although there are different methods achieving this under the respective Acts.

0716-78-R;0717-78-R Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Applicant, v. **A. Cupido Haulage Limited**, v. Canada Crushed Stone, A Division of Steetley Industries Ltd., Respondents v. United Steelworkers of America, Intervener.

Certification – Employee – Whether owner/operators dependent contractors – Whether dependent on broker or quarry operator – Relationship between owner/operator and quarry owner and broker examined – Criteria establishing dependency and identity of employer reviewed

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members H.J.F. Ade and W.F. Rutherford.

APPEARANCES: *Ken Petryshen and Mat Elliot for the applicant; Roy C. Fillion, A. Craig and A. Cupido for the respondent A. Cupido Haulage Limited; E.L. Stringer, Q.C. and Peter Boffa for the respondent Canada Crushed Stone; no one appeared for the intervener United Steelworkers of America.*

DECISION OF THE BOARD; May 23, 1980

1. This is an application for certification filed on July 17, 1978. The matter came on for hearing on August 8, 1978. In a decision dated August 14, 1978 the Board identified the issues raised by the application at paragraphs 5 of the decision as follows:

“The applicant is seeking bargaining rights for the dependent contractor owner/operator truck drivers who service the Canada Crushed Stone pit on Highway #5, Hamilton and who are dispatched through A. Cupido Haulage Ltd. The applicant takes the position that it does not know whether these persons are employees of Canada Crushed Stone or Cupido. Both Canada

Crushed Stone and Cupido deny that there exists within the meaning of the Act an employment relationship between either one of them and the persons for whom the union seeks bargaining rights. There is an issue raised, therefore, as to whether or not the persons for whom the union seeks bargaining rights are dependent contractors within the meaning of the Act and if so, which of the two named respondents they are dependent upon.

The applicant made it clear at the hearing, and amended its proposed bargaining unit in respect of Canada Crushed Stone to show that it seeks to represent only those dependent contractor owner/operator truck drivers who service the Canada Crushed Stone pit who are dispatched through A. Cupido. The applicant's position in this regard is consistent with its proposed unit in respect of A. Cupido which covers only those owner/operator truck drivers dispatched through Cupido who service the Canada Crushed Stone pit on Highway #5, Hamilton. Assuming that there are other owner/operator truck drivers employed as dependent contractors at either Canada Crushed Stone or A. Cupido, there is an issue raised as to whether the unit sought by the union is sufficiently broad to be appropriate for collective bargaining."

2. The Board appointed a Labour Relations Officer to meet with the parties and make certain inquiries. The Board's direction to the officer was framed as follows:

"The Board hereby appoints Mr. S. Netherton, Labour Relations Officer, to meet with the parties and inquire into the employee status, if any, of the persons claimed by the applicant to be owner/operator dependent contractors in the employ of either Canada Crushed Stone or A. Cupido. The Labour Relations Officer is authorized to inquire into the relationship between the persons for whom the union seeks bargaining rights and the respondent companies. In addition the Labour Relations Officer is authorized to inquire into the community of interest, if any, between the persons for whom the union seeks bargaining rights and any other persons who may work under similar terms and conditions for either Canada Crushed Stone or A. Cupido."

3. The report of the Labour Relations Officer in this difficult and complex matter was received by the Board on September 26, 1979. The report, including the exhibits and appendices, extends to 512 pages and sets out the evidence given by 12 persons. The officer described in detail the manner in which he carried out the direction of the Board in the preface to his report. As a result of his investigation the Labour Relations Officer discovered that 57 persons were involved with the hauling of aggregate from the Canada Crushed Stone Quarry during the relevant period. All 57 were connected in varying degrees to 11 brokers whose names are listed in the report. The officer secured agreements between the Parties (as set out in the report) in respect of the status of 39 of the 57 persons. It is agreed that 6 of these persons are employers in their own right and that 33 of the others are employees of one or other of these 6 and not dependent contractors engaged by either Canada Crushed Stone or Cupido Haulage. It is further agreed that 16 of the remainder are owner/operators whose status as either dependent or independent contractors is in dispute. 12 of these 16 are connected with Cupido Haulage. Finally, there is no agreement as to whether the two remaining persons (Messrs. Crisante and Perri), who are attached to A. Cupido Haulage, are either employees or owner/operators and if owner/operators whether dependent or

independent contractors. Needless to say the endeavours of the Labour Relations Officer and the co-operation exhibited by the parties has simplified the Board's task in this matter.

4. The Board must decide firstly, if the twelve owner/operators shown as attached to A. Cupido Haulage are dependent or independent contractors. If dependent contractors dependent upon Cupido a further issue arises as to whether Messrs. Crisante and Perri are also dependent contractors of Cupido and thus properly within a bargaining unit of dependent contractors working for A. Cupido Haulage. If the twelve are found to be dependent upon Canada Crushed Stone the Board must then determine if the remaining 4 owner/operators, who are attached to brokers other than Cupido, are also dependent upon Canada Crushed Stone, in which case they would also fall within a bargaining unit of dependent contractors working for Canada Crushed Stone. Finally, if the twelve are found to be dependent upon Canada Crushed Stone, the Board must also determine if Messrs. Crisante and Perri are dependent contractors dependent upon Canada Crushed Stone and therefore properly within a bargaining unit of dependent contractors working for Canada Crushed Stone.

5. The twelve owner/operators who are connected with A. Cupido were engaged by Canada Crushed Stone prior to 1977 after being interviewed by an official of the company. Each owned his own truck and licence before commencing to haul for Canada Crushed Stone. Canada Crushed Stone provided no financial assistance with respect to the yearly PCV fee, tools or equipment. Maintenance costs were borne by the owner/operators.

6. Prior to September, 1977 these owner/operators hauled almost exclusively for Canada Crushed Stone. The evidence is that on only a few days per year (about 5% of the time) did these owner/operators haul for others and that when they did it was usually during a slack period at the Canada Crushed Stone quarry. If a driver intended to work elsewhere on a particular day, he notified the Canada Crushed Stone dispatcher. As informal understanding existed however, that Canada Crushed Stone enjoyed first priority on the owner/operators' services. The Canada Crushed Stone dispatcher assigned loads to the owner/operators and marked the zone on the delivery slips. If overtime was required the dispatcher requested it. If an owner/operator was sick or had an accident or breakdown or for any other reason was unable to appear for work at the quarry he would notify the Canada Crushed Stone dispatcher. Occasionally, an owner/operator would arrange to have someone else drive his vehicle, usually without consulting Canada Crushed Stone. Vacations could be taken at any time but Canada Crushed Stone was usually notified. The owner/operator was responsible for delivering the load and where necessary collecting cash or cheque and returning the payments to the company. If an owner/operator experienced difficulty in collecting on a COD delivery he contacted the dispatcher.

7. The owner/operators were paid on a zone rate determined by Canada Crushed Stone and had little, if any, say in establishing these rates. They received their cheques from the dispatcher. Gas purchased from the company was shown as a deduction. However, deductions for Income Tax, Unemployment Insurance and Workmen's Compensation were not made. The owner/operators were not paid for stand-by time at the quarry. None of the drivers advertised their services or used business cards. Their vehicles were identified by a number assigned by Canada Crushed Stone.

8. In mid-September, 1977 Canada Crushed Stone decided that it would no longer deal directly with the owner/operators. The owner/operators were advised that in future

they would have to operate through one of several brokers. When Canada Crushed Stone notified the owner/operators of the impending change they protested by refusing to work until officials of the company discussed the matter with them. Cox and DaSilva testified that when the drivers refused to work the day after they were informed of the change they were told by officials of Canada Crushed Stone that the company wanted them back at work as soon as possible. Canada Crushed Stone suggested to the owner/operators that they split themselves among several brokers. The owner/operators had reservations, however, and chose A. Cupido as their broker. There are no written agreements between Cupido and the owner/operators. After the broker system was established, Canada Crushed Stone paid the broker's fee of 5 per cent until April 1, 1978, at which time the drivers were given a raise equal to the brokerage fee and simultaneously began paying the broker's fee themselves.

9. Very little has changed in the day-to-day routine of the owner/operators since the inception of the brokerage system. The owner/operators continue to report to the Canada Crushed Stone quarry on an almost day-to-day basis. They continue to take direction from the Canada Crushed Stone dispatcher and they perform in essentially the same manner as they did prior to September, 1977. The changes of note relate to the method of payment and the handling of complaints. The owner/operators now receive pay cheques marked "A. Cupido Haulage Limited, Broker's Account, Canada Crushed Stone." The owner/operators receive the rate sheets from Cupido and Cupido computes the weekly gross, based upon the rate sheet, and deducts his 5 per cent brokerage fee. If the amount shown on the pay cheque is in error the owner/operator contacts Cupido. The owner/operators continue to receive their cheques from the Canada Crushed Stone dispatcher. The drivers have been instructed at various times by both Cupido and Canada Crushed Stone to address their work-related complaints and concerns to Cupido. The evidence is, however, that at least some of the owner/operators continue to approach Canada Crushed Stone in respect of work-related matters. Since the broker system has been established there have been four meetings (December, January, February, March) between Cupido and the drivers. The broker's fee, loading procedures at the quarry and road grading were discussed at these meetings. In respect of the latter two issues, the owner operators asked Cupido to approach Canada Crushed Stone. There is evidence that the owner/operators lost confidence in the ability of Cupido to deal effectively with Canada Crushed Stone and so the owner/operators did not meet with Cupido as a group after March. There is no evidence that Cupido met with Canada Crushed Stone on their behalf in the three months prior to this application. Cupido is sometimes notified when one of the owner/operators is not able to work but this is often after the fact. It is the Canada Crushed Stone dispatcher who continues to be notified at the time. The customers to whom deliveries are made are the customers of Canada Crushed Stone. The owner/operators continue to work out of the Canada Crushed Stone quarry on an ongoing basis and have little day to day contact with Cupido.

10. There is no evidence before the Board that the terms of the relationship between Canada Crushed Stone and Cupido or between Canada Crushed Stone and any of the other brokers has been reduced to writing. The evidence establishes, however, that Canada Crushed Stone sent identical letters to Bowtenheimer Ltd., Benny Haulage and A. Cupido on December 29, 1977 announcing the rate schedule which it had determined would go into effect on January 1, 1978. The letters read:

"Some time ago, Canada Crushed Stone made a decision to deal directly with a limited number of trucking companies rather than individual truckers,

and thereby reduce its administration. Accordingly, we have drawn up the following rate schedule to go into effect January 1, 1978. If your Company is prepared to haul stone for us at the rate set out in the enclosed schedule please notify us in writing and furnish us with the following information.

1. Number of persons employed by you as follows: –
 - (a) direct employees,
 - (b) owner-operators.
2. Number of vehicles in service of your company either: –
 - (a) owned directly by you,
 - (b) owned by other operators.
3. Number of operated trucks you would be able to make available to us on a regular basis.

Thanking you for your attention. We remain,

Yours very truly

“P.S. RATCLIFF
Vice President
Sales & Development.”

Letters announcing the rate schedule in effect as of January 1, 1978 were sent to five other brokers between March and June. Cupido Haulage replied to Canada Crushed Stone's letter of December 29, 1977 by letter dated February 27, 1978. Cupido's letter reads:

“We acknowledge receipt of your letter of December 29, 1977. As you know, the rate schedule is still the subject of discussion between your company and ours. Accordingly, we are not in a position at this time to confirm any rate schedule, however, we are in a position to furnish you with the additional information which you requested in your letter.

At present, we employ approximately 19 employees on a direct hire basis. In addition, we regularly engage the services of a number of owner-operators. Five of these owner-operators drive vehicles licensed by our company. Eighteen others drive vehicles which are independently licensed. Of these eighteen, approximately four involve multi-vehicle operations.

We presently own twenty-two vehicles. Approximately thirty additional vehicles are owned by operators which we engage. We would be able to make approximately thirty-five trucks available to your company on a regular basis. If circumstances dictate, we would be able to supply any additional vehicles which might be required from time to time.

We trust this is the information which you require.

Yours very truly

“Anthony Cupido”
A. Cupido Haulage Limited”

There is no evidence before the Board that the discussions referred to in Cupido’s letter resulted in any alterations to the rate schedule drawn up by Canada Crushed Stone and put into effect on January 1, 1978. In April, 1978 the owner/operators were given an increase and at the same time were required to pay the broker direct so that from April, 1978 the broker’s fee has been deducted at source by the broker.

11. The union argues that the owner/operators in this case were dependent contractors within the meaning of the Act prior to September, 1977 and have continued to carry on as dependent contractors since the inception of the broker system. The union relies on the line of Board cases in which owner/operators hauling construction aggregate have been found to have been dependent contractors. Canada Crushed Stone agrees with the union’s submission that the owner/operators in this case are dependent contractors but maintains that following the inception of the broker system the owner/operators became dependent upon Cupido. Cupido, in turn, takes the position that the owner/operators are independent contractors and as such are not employees within the meaning of the Act. The respondent Cupido relies on evidence that the majority of the drivers own their own vehicles and licence and pay their own expenses, that a majority of the drivers’ vehicles are identified by the owner’s name on the side of the truck, that the drivers have a discretion as to the extent of work performed and that the drivers, albeit infrequently, work for other persons.

12. In support of its contention that the owner/operators are dependent contractor employees of Canada Crushed Stone the union relies on the fact that these owner/operators haul from the Canada Crushed Stone quarry on an ongoing basis, are under the day-to-day direction of the Canada Crushed Stone dispatcher, are paid on the basis of rate schedules prepared by Canada Crushed Stone and continue to serve Canada Crushed Stone customers. The union argues that Cupido did not hire these owner/operators and does not negotiate their rates or its own percentage fee. The union argues that the element of control must be assessed in a collective bargaining context and primary consideration given to who controls what the owner/operators do and who controls what they earn. The union refers to *Northern Television Systems*, 78 CLLC ¶16,031, a decision of the Canada Labour Relations Board, and asks the Board to conclude that Canada Crushed Stone controls the relationship and is the employer of these dependent contractors for purposes of the Act. The union characterizes Cupido Haulage as a payroll agent vis-a-vis its relationship to the owner/operators and asks how collective bargaining can take place with a payroll agent.

13. The respondent Cupido Haulage acknowledges that the “principle issue” in this case is the identity of the employer. Cupido refers the Board to the criteria set out in the *York Condominium* case, [1977] OLRB Rep. Oct. 648 which are used by the Board in determining which of two or more entities is the employer for purposes of an application brought under *The Labour Relations Act*. It is the position of Cupido that the owner/operators who are the subject of this application carried on the exact duties which they had prior to working through a broker and that Canada Crushed Stone continued to exercise the same direction and control over their work performance after they commenced to operate through brokers. Cupido takes the position that despite the fact the individuals subject to

this application were paid after September 14, 1977 by cheque which read "A. Cupido Haulage Ltd. Broker's Acct., Canada Crushed Stone", it is merely a payroll agent vis-a-vis these owner/operators. Cupido argues that Canada Crushed Stone continues to bear the burden of remuneration in that payment continues to be based on rates set by Canada Crushed Stone for loads hauled from its quarry to its customers. Cupido refers to the evidence of Harland Cox, Jr. and Dave Shaver that Canada Crushed Stone set rates for trips outside the zone map in further support of its position that it does not bear the burden of remuneration. Cupido denies emphatically that it has ever imposed discipline upon the owner/operators who are the subject of this application and maintains that there is evidence to suggest that Canada Crushed Stone retained its authority to discipline. Cupido takes the position that the relationship between the drivers and Canada Crushed Stone commenced well before September, 1977, continued beyond September 14, 1977 and continued to be in existence on July 17, 1978. Cupido denies that a new employment relationship was created between the owner/operators and Cupido argues that the changes of September 14, 1977, and those made subsequent thereto, constituted merely the transfer of the owner/operators and Dave Shaver Cartage to Cupido for payroll purposes and nothing more. Cupido maintains that the owner/operators considered Canada Crushed Stone to be their employer evidenced by the extent to which they accepted control and direction from Canada Crushed Stone and notified Canada Crushed Stone when they would not be reporting to work because of illness, personal reasons or vacation. Cupido explained that its role as spokesman on behalf of the owner/operators was as an agent or representative and not as an employer and maintains that the evidence which shows that some of the owner/operators concluded they would obtain better results by approaching Canada Crushed Stone directly supports this conclusion. It is the position of Cupido that the consensual element required in an employment relationship does not exist as there never was any intention on the part of Cupido or the drivers to enter into such a relationship. Cupido maintains that at best the owner operators were willing to work through Cupido as their payroll agent as a condition of continuing to be employed by Canada Crushed Stone. The respondent Cupido argues that on the evidence it must be found that the owner/operators remained under the direction and control of Canada Crushed Stone and in the absence of any intention to form an employment relationship with Cupido the Board must find that they are employees of Canada Crushed Stone. Cupido referred the Board to the *Adbo Contractors* case, [1977] OLRB Rep. Apr. 197 as an example of a fact situation which would require a finding that the broker is the employer. If the Board finds the owner/operators to be dependent contractors, Cupido asks that it be found that they are economically dependent upon Canada Crushed Stone.

14. The respondent Canada Crushed Stone maintains that the criteria used by the Board to identify the employer in the normal employer/employee situation cannot be applied in a carbon copy manner to a dependent contractor situation. Canada Crushed Stone asks the Board to begin its analysis by recognizing firstly, that Canada Crushed Stone terminated its relationship with the owner/operators who are the subject of this application and secondly that these owner/operators did not drift to Cupido but took a decision to operate through Cupido. It is the position of Canada Crushed Stone that Cupido hired the owner/operators at this time. Canada Crushed Stone argues that the fact that very little else in the day to day work routine changed must be seen as a red herring in the context of the company's operation where very little else could change. Canada Crushed Stone asks the Board to consider the alleged control exercised by it over the owner/operators in the context of an operation where the same type of alleged control is exercised over other employers, the employees of these other employers and brokers. Canada Crushed Stone maintains that if a

company can exercise this type of control over persons who are obviously not its employees it is not an indicia of an employer/employee relationship. Canada Crushed Stone asks the Board to discount evidence of the owner/operators that they viewed or perceived Canada Crushed as the employer because of their predisposition to this result. Similarly, the respondent Canada Crushed Stone considers the continued attempt by the owner/operators to deal with it as habit or as an attempt to provide the basis for additional self-serving evidence. Canada Crushed Stone maintains that the customer always bears the burden of remuneration in a sub-contracting arrangement but that does not establish an employer/employee relationship with the persons working for the sub-contractor. Canada Crushed Stone argues that Cupido has input into the setting of the rate and refers the Board to the February 27th letter from Cupido to itself in support.

15. Canada Crushed Stone asks the Board to find that Cupido hired the owner/operators, called them to meetings, assigned them to Canada Crushed Stone, and paid them. Canada Crushed Stone argues that the indicia which might indicate that the owner/operators are dependent upon it are in fact indicia of a contractor/sub-contractor relationship between itself and Cupido under which Cupido supplies a service to Canada Crushed Stone using his own employees.

16. Section 1(1)(ga) of the Act defines a “dependent contractor” as follows:

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

and section 1(1)(gb) goes on to provide:

“employee” includes a dependent contractor.

The Board does not determine dependency and then undertake a separate inquiry in order to determine the identity of the employer. If the persons who are the subject of this application are found to be dependent, the person upon whom they are dependent is the employer for purposes of the Act.

17. We are referred in argument to the criteria listed in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645, which has been used by the Board to determine which of two or more entities is the employer for purposes of an application brought under *The Labour Relations Act*. A “dependent contractor” inquiry, however, does not focus on the identification of a traditional employer/employee relationship but rather, the identification of a relationship which more closely resembles that of employer/employee than that which would exist between two independent businesses. While these criteria may be utilized in a “dependent contractor” inquiry it is important to recognize that the object of the inquiry is less specific than identifying a party exhibiting all the necessary indicia of an employer. Rather, if the relationship more closely resembles an employment relationship than that which would exist between two independent businesses, a finding that a “dependent con-

tractor” relationship exists will result. The statutory definition forces the Board to engage in a comparative exercise; to determine on which side of the mid point of an imaginary line between independent contractor and employee the disputed persons fall.

18. The nature of the Board’s task in a “dependent contractor” inquiry has been succinctly set out in the *Superior Sand, Gravel & Supplies Ltd.* case, [1978] OLRB Rep. Feb. 119. The Board stated at para. 19:

“In cases such as this one the Board must distinguish the workman from the true entrepreneur. The task is not an easy one since there exists no clear line of demarcation. Determining who falls within the Act as a dependent contractor is essentially a factual exercise. The legal test, found in section 1(1)(ga) of the Act provides the Board with only a point of reference but, as the Board has already noted in *Adbo Contracting Ltd.*, *supra*, it is a more useful and less confusing reference point than those adopted by the Board prior to the enactment of the dependent contractor provisions. This new point of reference leads the Board directly to the substance of the economic relationship, and away from those matters of form which merely obscure its reality. While it may be quite true that the Board might reach the very same result by recourse to the old points of reference, this new test provides a more direct and understandable route to the ultimate result.”

and went on at paras. 23 and 24:

“23. Both arguments, in our view, tend to obscure the considerations that the Board must take into account when determining whether a person is a dependent contractor. As we have already noted in the *Adbo* case, *supra*, there is a shaded area on the spectrum of economic relationships where it is difficult to determine whether a person is functioning as a workman or an independent contractor. The Board, however, is required to draw a line through that shaded area when determining the extent of the coverage of *The Labour Relations Act*. When drawing this line, the Board can gain only limited assistance from benchmarks that also lie within that shaded area, such as the ones suggested by counsel. Differences between situations within the shaded area, although perhaps appearing small, can be significant, given that such situations themselves lie very close to the line. More visible benchmarks, therefore, should be used by the Board if the line is to be drawn with any accuracy.

24. Our task is to make the determination by reference to the criteria set out in the statutory definition of dependent contractor. This definition directs the Board to examine the types of economic dependence and the kind of business relationship, or obligation, that it has before it, and further directs the Board not to give undue emphasis to whether there exists a formal contract of employment and whether or not a person furnishes his own tools, vehicles, equipment or machinery. In the final balance, the Board must be satisfied that the relationship before it, even though it may not bear all the hallmarks of the typical employment relationship, more closely resembles the relationship of an employee than that of an independent contractor.”

19. The statutory definition directs us not to use the existence or non-existence of a contract of employment or the ownership of tools, vehicles, equipment, etc. as benchmarks. Typically, in the construction aggregate cases those found to be dependent contractor/employees under the Act have not been party to a contract of employment and have owned their own vehicle. The Board, however, has found that a contractor who owns more than one truck and hires others to drive these other trucks more closely resemble an independent contractor than an employee in his business relationship and have excluded this type of contractor from the Act. (See *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806.) The Act does not extend to persons engaged in an essentially entrepreneurial undertaking.

20. The Board suggested in *Superior Sand, Gravel & Supplies Ltd.*, *supra*, that only limited assistance could be gained from benchmarks which lie close to the mid point of the imaginary line referred to above and suggested that “more visible benchmarks” be used by the Board if the line is to be drawn with accuracy. The dependent contractor sections of the Act were enacted in 1976 and since that time the Board has dealt with a number of cases involving owner/operators operating out of sand and gravel quarries and hauling construction aggregate. (See *Nelson Crushed Stone*, [1977] OLRB Rep. Feb. 104, *Adbo Contracting*, [1977], OLRB Rep. April 197; *Indusmin Ltd.*, [1977] OLRB Rep. Sept. 552; *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806; *Superior Sand, Gravel & Supplies Ltd.*, *supra*; *Dufferin Aggregates*, [1978] OLRB Rep. Mar. 278; *Consolidated Sand & Gravel*, [1978] OLRB Rep. Mar. 264; *Sherman Sand & Gravel*, [1978] OLRB Rep. May 459; *Flintkote Co. of Canada*, [1978] OLRB Rep. Sept. 822 and *Giordano Sand & Gravel*, [1978] OLRB Rep. Nov. 989.) Certain common characteristics indicative of a dependent contractor relationship emerge from a reading of these cases. These common characteristics constitute the “more visible benchmarks” referred to in the *Superior Sand, Gravel & Supplies Ltd.* case, *supra*.

21. In deciding whether owner/operators who do not employ others on a regular ongoing basis more closely resemble independent contractors or employees, the Board has looked to the source of work. If the owner/operator looks to the quarry for the bulk of his work and does not advertise or otherwise solicit customers on his own, and is generally available during the working hours of the quarry, he is acting more like an employee truck driver than an independent contractor. The Board looks to the percentage of income derived from the relationship under inquiry. If the owner/operator derives a substantial portion of his income from the quarry (the amount ranged from 80 per cent to 100 per cent in the reported cases) he is in a position of economic dependence more like an employee than an independent contractor. The Board looks to the manner in which the amount of payment is determined. If the rates for work performed are established without consultation or with minimal consultation by the quarry, the owner/operator is in a position analogous to an unorganized employee. The Board looks to control of work methods and work procedures. If the method of work and the procedures under which it is performed are controlled by the quarry, the owner/operator is in a position more closely resembling an employee than an independent contractor. Generally the Board has looked to these visible benchmarks, weighed the evidence in respect of each, considered whatever other relevant factors exist and made a comparative assessment as to whether the owner/operator more closely resembles an employee or an independent contractor.

22. The Board has twice looked to a three-sided relationship between owner/operator, broker and quarry owner. In the *Indusmin Limited* case, *supra*, the Board stated at para. 14:

“The Board finds that the broker driver, assuming him to be an employee, holds a contractual relationship with the broker with respect to his terms and conditions of employment. The amount of his remuneration is negotiated with the broker, the nature and frequency of assignments are determined by the broker, the quality of his work performance is measured by the broker and the source of his income is controlled by the broker. His only contact with Indusmin is a functional one. That contact is dependent upon the decision of the broker’s dispatcher to assign him to Indusmin. And in this regard Indusmin looks to the broker for the proper discharge of the driver’s duties. The Board, therefore, finds ‘the broker driver’ to be an employee (assuming but without finding that this is the case) of the broker and not the respondent. (See: the *Goldist Construction Limited* case, [1967] OLRB Rep. 1016 Mar. at p. 1018; the *Women’s College Hospital* case, [1977] OLRB Rep. Feb. 65.)”

The Board, therefore, removed the names of the “broker drivers” from the list of persons falling within a unit of dependent contractors of the respondent.

23. In *Adbo Contracting Company Ltd.* case, *supra*, the Board found that a number of owner/operators were dependent contractors of a broker and therefore protected by the Act. The Board found that the owner/operators relied almost exclusively upon the broker to supply them with work; that they were instructed by the broker the evening before the job as to where and when to report (although on-the-job direction came from the contractor and not the broker), that the broker obtained the work from a number of customers on the basis of his ability to quote a price and provide service and that the broker negotiated a lower rate with the owner/operators. The Board concluded at para. 29:

“Not only did Pasinato, and the other brokers, control the source of work through the contacts they had built up, but they also controlled the remuneration to be paid the complainants for performing that work. The complainants dealt with Pasinato, it was Pasinato who ultimately set the rate for the complainants. If the complainants wished to improve their economic lot, they had to look to Pasinato, and not to the persons with whom Pasinato dealt.”,

and found that there existed a type of economic dependence on the broker more closely resembling that of an employee than that of an independent contractor.

24. If the brokerage system had not been introduced by Canada Crushed Stone in mid-September, 1977 this would not be a difficult case. The relationship between Canada Crushed Stone and the owner/operators prior to mid-September, 1977 carried the essential hallmarks of a dependent contractor relationship as found by the Board in the construction aggregate case. The owner/operators relied on Canada Crushed Stone for the bulk of their work and about 95 per cent of their earnings. They performed a service for Canada Crushed Stone in respect of Canada Crushed Stone’s customers at rates set by Canada Crushed Stone and worked under the day-to-day direction and control of Canada Crushed Stone. The owner/operators were clearly dependent contractors in their relationship with Canada Crushed Stone prior to the institution of the brokerage system.

25. Canada Crushed Stone maintains that it terminated its relationship with the owner/operators at the time it moved to the brokerage system and that the owner/operators in turn took a deliberate decision to align themselves with Cupido. Canada Crushed Stone maintains that the owner/operators were dependent upon Cupido and could not work without maintaining a relationship with Cupido or another broker. Canada Crushed Stone maintains that very little turns on its continued control over the day-to-day work of the owner/operators in that the same type of control is exercised over employers, the employees of these employers and brokers working out of its Hamilton quarry. There is no doubt that the owner/operators must maintain a relationship with Cupido if they wish to continue hauling for Canada Crushed Stone. The requirement to work through a broker, however, is one of Canada Crushed Stone's making and the fact that it exists and that the owner/operators sought out Cupido does not mean that the owner/operators are dependent upon Cupido within the meaning of the Act. We view the determination by Canada Crushed Stone that the owner/operators would henceforth work through brokers as evidence of the control which Canada Crushed Stone enjoyed over the owner/operators and the acceptance of this arrangement as evidence of their economic dependence.

26. Since the inception of the brokerage system the owner/operators have continued to haul almost exclusively for Canada Crushed Stone. The owner/operators are present at the quarry on a daily basis. In contrast to the *Indusmin* and *Adbo* cases, *supra*, where the owner/operators were assigned to a variety of the broker's customers, the owner/operators in this case have continued to work almost exclusively for Canada Crushed Stone since the inception of the brokerage system. They continue to look to Canada Crushed Stone as the primary source of their work and the primary source of income. We are satisfied on the evidence that Canada Crushed Stone set the rate to be paid to both the owner/operators and the broker following the inception of the brokerage system. While the owner/operators were paid on cheques issued over the name of Cupido the words "Broker's Account Canada Crushed Stone" appear on the cheques. These cheques were distributed by the Canada Crushed Stone dispatcher to the owner/operators who worked almost exclusively for Canada Crushed Stone. Canada Crushed Stone continues to control the day-to-day work of the owner/operators. The fact that the same control is exercised over non-employees does not significantly diminish the weight of this factor as it might if we were attempting to identify the parties to a traditional employer/employee relationship. The statutory definition requires us to focus on the mid point of a spectrum of relationships between independent contractor and employee. Those who are not before us but who are controlled to the same degree as the owner/operators in their day-to-day work are beyond the scope of our inquiry because factors other than day-to-day control have caused the parties to agree that they more closely resemble independent contractors. If there had been no agreement in respect of these persons the element of control would be a relevant and visible benchmark in deciding the issue of their dependency and remains a relevant and visible benchmark in deciding the issue of the owner/operators' dependency.

27. The factors which caused the Board to find that the owner/operators in the *Adbo* case, *supra*, were dependent upon the broker cause us to conclude in this case that the owner/operators continue to be dependent upon Canada Crushed Stone. Cupido was inserted into the relationship between Canada Crushed Stone and the owner/operators by Canada Crushed Stone. However, the essential nature of the relationship between Canada Crushed Stone and the owner/operators did not change. We are satisfied on the evidence that the owner/operators who aligned themselves with Cupido continued to perform work or serv-

ices for Canada Crushed Stone for compensation such that they continued in a position of economic dependency upon Canada Crushed Stone more closely resembling the relationship of an employee than that of an independent contractor.

28. There are six others who haul almost exclusively out of Canada Crushed Stone quarry who may also be dependent upon Canada Crushed Stone within the meaning of the Act and hence within a unit of dependent contractors at the Canada Crushed Stone quarry. These are V. Biancale and D. Schaefer (connected with Bowtenheimer Ltd.), J. Gerritson and L. Garlow (connected with Benny Haulage), and T. Crisante and D. Perri (connected with Cupido Haulage).

29. Messrs. Biancale and Schaefer worked directly for Canada Crushed Stone for a short time prior to operating through Bowtenheimer Ltd. in May, 1977. Bowtenheimer's relationship with these two drivers is very similar to the relationship between Cupido and the owner/operators assigned to Canada Crushed Stone through him. Bowtenheimer does not assign these owner/operators to any other customer. They work almost exclusively for Canada Crushed Stone. They do not report to Bowtenheimer on any regular basis. Their contact with Bowtenheimer consists of submitting the statements of their work to him and receiving their pay from him. They are paid on the same basis as those assigned through Cupido and have as little say in the setting of their rates as the owner/operators operating through Cupido. Their daily routine at Canada Crushed Stone is the same as the owner/operators assigned through Cupido. When reference is had to the "visible benchmarks" referred to in this decision the Board can come to no other conclusion but that Messrs. Biancale and Schaefer perform work or services for Canada Crushed Stone and are in a position of economic dependence upon Canada Crushed Stone such that in their relationship with Canada Crushed Stone they more closely resemble employees than independent contractors. They are dependent contractors of Canada Crushed Stone and accordingly are properly within a bargaining unit of dependent contractors operating out of the Canada Crushed Quarry on Highway #5 in Hamilton.

30. Messrs. Gerritson and Garlow operate through Benny Haulage. For the two year period prior to this application they also have been assigned to the Canada Crushed Stone quarry on a regular ongoing basis and follow the same daily routine as the other owner/operators working there. They do not contact their broker on a daily basis or have significant input into the setting of the rate schedule under which they are paid. The evidence establishes, however, that Mr. Garlow, whose evidence is representative of both himself and Mr. Gerritson, has worked through Benny Haulage for 40 years. Mr. Garlow has OHIP and union dues (as a union member but not as a member of a bargaining unit) deducted from his pay cheque by Benny. The existence of a long-standing relationship with the broker is a significant distinguishing feature, and when considered in light of the other evidence relating to the relationship between Benny and these two owner/operators, supports the conclusion that these owner/operators are more closely attached to their broker than the other owner/operators who have been assigned on a regular ongoing basis to the Canada Crushed Stone quarry. Notwithstanding the closer ties between these owner/operators and the broker, we are satisfied that Messrs. Gerritson and Garlow are dependent upon Canada Crushed Stone within the meaning of the Act. The factors which distinguish their relationship with Canada Crushed Stone from that of the other owner/operators are not of sufficient weight to cause the Board to conclude either that they are not dependent or that they are dependent upon the broker. When reference is had to the "visible benchmarks" which have been used by the

Board in inquiries of this type and the evidence as it relates to the relationship between these owner/operators and Canada Crushed Stone, we are satisfied that these two are also dependent upon Canada Crushed Stone. Accordingly, they are also within the unit of dependent contractors operating out of the Canada Crushed Stone quarry on highway #5 in Hamilton.

31. Messrs. Crisante and Perri, although attached to Cupido, work out of the Canada Crushed Stone quarry on a regular ongoing basis. They report to the Canada Crushed Stone quarry on a daily basis, are controlled in their work by the Canada Crushed Stone dispatcher and service Canada Crushed Stone customers. However, like Messrs. Gerritson and Garlow they are closer to their broker than the twelve owner/operators found to be dependent contractors of Canada Crushed Stone at paragraph 27 herein. As with Messrs. Gerritson and Garlow, they have a relationship of longer standing with the broker, use his gas pumps and report absences from the job to the broker. In addition, Messrs. Crisante and Perri use trailers owned by the broker and operate under a PCV licence owned by the broker. They each own their own tractor. The trailer and the PCV licence along with the tractor constitute the tools of the trade. An owner/operator may own these tools or he may rent or lease them. The effect of renting or leasing is not to make the owner/operator dependent upon the person from whom he rents or leases. Indeed, section 1(1)(ga) of the Act stipulates that a person may be a dependent contractor whether or not he furnishes his own tools, vehicles, equipment etc. The section directs us to look to the relationship between the person whose status is in dispute and the person for whom he performs work or services in deciding whether a dependent contractor relationship exists. We are satisfied that Messrs. Crisante and Perri perform work or services for Canada Crushed Stone. When we look to the visible benchmarks, we are satisfied that Messrs. Crisante and Perri look to Canada Crushed Stone for the bulk of their work and as the primary source of income. They are subject to the control of the Canada Crushed Stone dispatcher in the carrying out of their work and their rates are set by Canada Crushed Stone. The relationship of these contractors to Cupido is clearly distinguishable from the relationship which existed between the owner/operators and brokers in both the *Adbo* case, *supra* and the *Indusmin* case, *supra*. Messrs. Crisante and Perri are dependent contractors dependent upon Canada Crushed Stone and accordingly, they fall within the bargaining unit of dependent contractors working at or out of the Canada Crushed Stone quarry.

32. The Board finds that the dependent contractor/owner/operator/truck drivers of the respondent Canada Crushed Stone working at or out of the Canada Crushed Stone quarry on Highway #5, Hamilton, constitute a unit of employees of the respondent appropriate for collective bargaining.

33. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on July 31, 1978, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

34. A certificate will issue to the applicant.

2195-79-U Service Employees Union, Local 204 AFL-CIO-CLC,
Complainant, v. **Doral Construction Limited** and Michael Allen,
Respondents.

Evidence – Practice and Procedure – Whether earlier findings of fact in previous proceeding *res judicata* – Whether earlier findings necessary to Board’s decision – Sub-contracting of work and termination of employees violating section 58

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and H. Simon.

APPEARANCES: *Jeffrey Sack, Steven Shrybman and Tom Small for the complainant; M. P. Forestell, Q. C. for the respondents.*

DECISION OF THE BOARD; May 29, 1980

1. This is a complaint under section 79 of *The Labour Relations Act* alleging that the grievors, Steve Kita, Mark Lariviere, Richard E. Mooney, Christopher Meskis, Albert Petti and Neil Schmaltz, were terminated by the respondent contrary to sections 56, 58, 61 and 63(2) of the Act. This matter was filed along with an application for consent to prosecute (Board File No. 2198-79-U) which has been held in abeyance.

2. The respondent is part-owner of the Seaway Shopping Mall in Welland, and until the incidents giving rise to this complaint, carried out its own maintenance and security on the premises. The complainant alleges that the six grievors, who were employed by the respondent for that purpose, became dissatisfied with their conditions of employment and as a result contacted the complainant on or about February 13, 1980. Membership cards were then signed by all six grievors. The complainant further alleges that at a meeting on February 14th with the respondent’s General Manager, one of the employees, upon being refused a wage increase, advised the General Manager that the employees were already seeking the assistance of a trade union in any event. The next day all six of the grievors were advised that their work was being contracted out, and each was given two weeks’ notice of termination. As a rebuttal to the inference which might otherwise be drawn from this sequence of events, the respondent states that it made the decision to contract out the grievors’ work as early as January of 1980, and the news of the grievors’ organizing activity merely hastened implementation of that decision, in order to avoid problems with section 70(2) (the “freeze” provision) of *The Labour Relations Act*.

3. This matter has been before the Board in a prior application under section 83 of *The Labour Relations Act* being Board File No. 2197-79-U, alleging that the respondent had engaged in an unlawful lockout in terminating the grievors, and requesting the Board to issue a cease-and-desist order. That application was dismissed in a decision of the Board dated March 19, 1980. The complainant, however, takes the position that certain critical matters of fact found by the Board in the course of that decision are now *res judicata* between the parties, and accordingly the respondent is now estopped from contesting those matters in the present proceedings. Specifically, the complainant relies on the finding of the Board in paragraph 7 of that decision “that the decision to contract out the cleaning and security work was taken on *February 15th* when Demont obtained acceptable terms from the

two contractors” [emphasis added]. The complainant relies as well on the further statement contained in that paragraph that “I find on the evidence that the decision to terminate the employees was a direct response of the respondents to learning of the presence of a trade union”, and the statement in paragraph 9 of the decision that: “There can be no doubt on the evidence in this case that the respondent’s actions were the product of an anti-union sentiment”. Certainly these were central issues, fully canvassed, with full opportunity to both parties to present their case, in the proceedings before the prior panel. There appear to be cogent reasons, both from the point of view of the complainant and the Board, not to have these issues re-litigated in the present proceedings. It is essential, however, to review the prior decision carefully, in order to determine what, as a matter of law, it actually did decide.

4. As noted above, the Board was faced with an application alleging that an unlawful lockout had taken place. Section 1(1)(i) of *The Labour Relations Act* defines “lockout” as follows:

“1.-(1) In this Act,

- (i) ‘lock-out’ includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union or the employees.”

The Board in the prior proceeding accordingly addressed itself to two questions: Was the employer’s action a response to its employees’ exercise of their rights or privileges under the Act, and, if so, was the employer’s action taken with a view to compel the employees to refrain from exercising those rights or privileges? The Board was unequivocal in determining the first question against the respondent, and that is the determination upon which the complainant now seeks to rely. The problem, however, is that the Board went on to determine the second issue in favour of the respondent, so that no order was made against the respondent at all; the application was dismissed. What then, for purposes of *res judicata* or estoppel, did that decision determine against the respondent? The answer appears to be: nothing at all.

5. The extent to which the Board is entitled (and indeed encouraged) to make use of its prior decisions between the same parties has been the subject of considerable comment in two recent Divisional Court decisions involving Tandy Electronics Limited (*Tandy Electronics Limited v. United Steelworkers of America and Ontario Labour Relations Board*, 79 CLC ¶14,216; *Tandy Electronics Limited v. United Steelworkers of America and Ontario Labour Relations Board*, 80 CLC ¶14,017). In particular, the Divisional Court stated at page 12,091 of the second decision:

“The extent to which they can be utilized must be restricted to the actual decision of the Board together with those findings of fact made by the Board

that were essential to its decision. No other findings of fact or evidence that may be contained in the decisions should be considered."

Guidance as to what findings can be said to be "essential" to a decision can be found in the leading English case of *Penn-Texas Corporation v. Murat Anstalt* (No. 2), [1964] 2 Q.B. 647. That case arose out of the second in a series of applications involving the same parties on the same subject matter. The plaintiff, an American company, sought to have the Courts in England order production of documents against an English company. On the first application the Court decided a preliminary matter in favour of the plaintiff, specifically, that the Court had the power to order a limited company to produce documents. The Court went on, however, to dismiss the application because the documents being sought were not specifically identified. The plaintiff in the second application sought to rely upon the prior determination of the Court on the preliminary matter, and took the position that the defendant was estopped from contesting that determination. The issue proceeded to the English Court of Appeal, and is succinctly dealt with in the decision of Lord Denning M.R., commencing at page 660:

"The first thing to consider is *what was actually decided by this court in Penn-Texas* (No. 1), *so far as the English company was concerned*. It was a case under the Foreign Tribunals Evidence Act, 1856. The American company applied for an order that the English company should, by its proper officer, attend before the examiner and (1) give evidence on oath, and (2) produce documents. *The result of the application was that no order was made at all against the English company...*

The American company asked for leave to appeal to the House of Lords. Both this court and the Appeal Committee of the House of Lords refused leave. Note that there was no application by the English company for leave to appeal: for the simple reason that there was nothing for them to appeal against. No order had been made against the English company.

The American company have now remedied the defect in their earlier application. They have specifically identified the documents which they seek. And they request the court to make an order on the English company to produce them. The master and the judge have made an order for production. The English company now appeals to this court. They say that this court in *Penn-Texas* (No. 1) was wrong in saying ... that there was power to order a limited company to produce documents. They say that, just as, under the Foreign Tribunals Evidence Act, 1856, a limited company cannot be ordered to give evidence so also it cannot be compelled to produce documents.

The first question is whether it is open to the English company to raise this point at all. ... In my opinion a previous judgment between the same parties is only conclusive on matters which were essential and necessary to the decision. It is not conclusive on other matters which came incidentally into consideration in the course of the reasoning: see the *Duchess of Kingston's* case, (1776) 2 Smith's L.C. (13th ed.) 644, 645; 20 S.T. 355 and *Reg. v. Hutchings*, (1861) 6 Q.B.D. 300, (C.A.). One of the tests in seeing whether a matter was necessary to the decision, or only incidental to it, is to ask: Could the party

have appealed from it? If he could have appealed and did not, he is bound by it, see

Badar Bee v. Habib Merican Noordin, [1909] A.C. 615, 623, (P.C.) by Lord Macnaghten. If he could not have appealed from it (because it did not affect the order made), then it is only an incidental matter, not essential to the decision, and he is not bound: see *Concha v. Concha*, (1886) 11 App. Cas. 541, 552, (H.L.) by Lord Herschell. The ruling by this court in *Penn-Texas* (No. 1) (that there was power in the court to order a limited company to produce documents) was only an incidental matter. It was not essential to the decision. No appeal lay from it. It is not therefore *res judicata* between the parties. It has only the weight that falls to be attributed to it on the doctrine of *stare decisis*: . . .” [emphasis added]

6. In the present proceedings there is, strictly speaking, no question of *stare decisis*, since the findings sought to be relied upon were matters of fact rather than law. However, Lord Denning’s discussion of the doctrine of *stare decisis* in the *Penn-Texas* case led him to comment further on what is meant when the court speaks of findings “necessary” to a decision. The pertinent discussion follows at p. 661:

“Those cases show that the House will not treat as absolutely binding any line of reasoning in a previous case which was not necessary to the decision: but will regard itself as at liberty to depart from it if convinced that it was wrong. Apply that to this case. The ruling on the second point in *Penn-Texas* (No. 1) was not necessary to the decision. *The result would have been the same, even if the ruling had been the other way.*” [emphasis added]

Lord Denning goes on to say that, “the ruling is not therefore absolutely binding, and we are at liberty to depart from it if convinced it is wrong”. The Board notes, however, that this final statement appears applicable only to findings of law, as in the *Penn-Texas* case. On findings of fact, it would appear that a tribunal is either bound by a prior finding, or it is not. If it is not, the tribunal must hear all of the evidence afresh, and form its own conclusions solely on the basis of the evidence before it.

7. This same issue is commented upon at some length in Spencer Bower and Turner, *The Doctrine of Res Judicata* (2nd ed. London: Butterworths, 1969), at page 51:

“When an action, or motion, or application, is dismissed by a judicial tribunal after a trial or hearing, it is often a question whether anything can be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal. The answer to this inquiry depends upon whether, on reference to the record and such other materials as may properly be resorted to, *the dismissal itself* is seen to have necessarily involved a determination of any particular issue or question of fact or law, in which case there is an adjudication on that question or issue; if otherwise, the dismissal decides nothing, except that in fact the party has been refused the relief which he sought.” [emphasis added]

and further at page 54:

“And it must be noticed that where a proceeding has been dismissed, no matter of fact expressly determined in the course of the dismissal will found an estoppel unless such a finding was necessary to the dismissal. So (in Australia) where in the first proceedings the court had accepted a plaintiff’s submission that the resolution of a Municipal Council was valid, but had nevertheless proceeded to refuse plaintiff the relief which he sought, it was held that in a subsequent proceeding between the same parties the issue of the validity of the Council’s resolution was not *res judicata*.”

8. In support of his position, counsel for the complainant refers to the Board the case of *Morgan Power Apparatus Limited v. Flanders Installations Limited*, (1972), 27 D.L.R. (3d) 249 (B.C.C.A.) which cites the following oft-quoted passage from *Henderson v. Henderson*, (1843), 3 Hare 100, 67 E.R. 313:

“In trying this question, I believe I state the rule of the Court correctly, when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

The passage from *Henderson v. Henderson*, however, appears to the Board on a proper reading to purport to delineate only those matters which may be taken to have been decided against a party by a decision *adverse* to it, and in particular is most commonly quoted with regard to what has been termed “cause of action” estoppel. A review of the facts in the *Morgan Power* case discloses that to be true in that instance as well. The case does not purport, in the Board’s view, to even address itself to the question of what matters may be found to have been conclusively determined against a party where the ultimate decision is in fact in the party’s favour. The *Morgan Power* decision is, therefore, of no assistance to the complainant.

9.

The Board finds the reasoning and conclusions in the *Penn-Texas* case to be applicable to the case at hand. Here certain determinations were made against the respondent in a prior application which were “necessary” in the course of the Board’s inquiry at the time, but which cannot be said to have been “necessary” to the Board’s ultimate decision. The decision was to dismiss the application, and that was a conclusion which obviously relied in no way on the earlier determinations against the respondent. In addition, as noted in *Penn-Texas*, even if the respondent had felt grievously wronged by the manner in which the Board arrived at its conclusions on the *preliminary* determinations, it would not likely have been in a position to seek relief from the courts (in our situation, by way of judicial review) because it could show no prejudice to it in the Board’s ultimate order, which was in its favour. The Board in the present proceedings believes therefore that there is no principle of

law restricting the respondent's right to re-litigate the issues that were before the prior panel, and the Board must proceed with an examination of the evidence placed before it.

10. There is no dispute that Mr. Demont, the respondent's General Manager, was advised by Mr. Petti, one of the grievors employed on maintenance in the Mall, that the men had been talking to a union. That conversation took place on February 14th, 1980. The next day all of the grievors received notice of termination on the basis that their work had been contracted out. As noted above, the position of the respondent was that it was at that point in time simply implementing a decision to contract out that had been made sometime in January, before the respondent became aware of the grievors' union activity.

11. According to the respondent, it had been concerned about the cost of its maintenance and security for some time. These form part of a number of costs relating to the common areas of the Mall, which are apportioned amongst the tenants in the Mall and paid in conjunction with monthly rents. In December or November of each year the respondent makes an estimate of what it feels these costs would be for the ensuing year, and the tenants are charged accordingly. At the end of the year, the estimated cost is reconciled with the actual expense and adjustments are made to compensate for either a shortfall or an overpayment. Mr. Allen, the President of the respondent company, testified that he feels his company is under an obligation to manage these costs wisely on behalf of the tenants, and that indeed the obligation is almost a fiduciary one. A specific estimate was requested and received from a cleaning contractor, Mr. Rick Cassidy, in August of 1979. Mr. Demont told Mr. Cassidy, however, that the company was going to wait until the end of the year to make up its mind. The company makes up its own monthly cost sheets within 10 to 15 days of the end of each month, and Mr. Demont testified that from these he could see as the year-end approached that the costs of maintenance and security were continuing to escalate. He testified further that when he received the totals for the preceding twelve months in mid-January of 1980, he calculated that the cost-saving, based on Mr. Cassidy's August estimate, would be in the neighbourhood of \$20,000.00. He testified that he then decided, after discussing the matter with Mr. Allen, to contract the work out to Cassidy, but felt he should delay implementation until he could check the company's year-end figures with the audited figures which would be available in mid-February. He acknowledges that he then, on February 14th, had the aforesaid conversation with Mr. Petti about the grievors' union activity, after which he immediately contacted Mr. Allen at the latter's club. Upon receiving this news, Mr. Allen rushed over to the Mall, and Mr. Allen and Mr. Demont together consulted with the company's solicitor. They were advised by the solicitor that as long as they had not yet received official notice of an application for certification, they could proceed with their decision to contract out the work. The next day Mr. Demont contacted Mr. Cassidy and asked him if his August estimate was still good. Mr. Cassidy replied that it would still be within a thousand dollars, and Mr. Demont asked for that in detail. The two men then signed a cleaning contract on that day. At the same time Mr. Demont arranged to contract the security work to an outside firm which had handled security for the Mall at some point in the past. The employees were then given notice of termination, effective the end of February.

12. When asked by the complainant's counsel whether, following the contracting-out of the maintenance work, the respondent received from its tenants an increased number of complaints about the quality of maintenance being performed, Mr. Allen testified that there were no more than usual. This led the parties into a time-consuming inquiry on this clearly

collateral matter. The Board finds, however, that the collateral evidence, taken as a whole, was not sufficiently unequivocal to be of significant assistance in determining the issue before it. There was, in addition certain evidence tendered as to by-play between individual grievors and the members of management prior to the time of the terminations, but since the terminations had nothing to do with the conduct of the grievors, the Board finds little assistance in this evidence as well. The focal point of the inquiry must be the respondent's account of the sequence of events leading to the decision to contract out the work of the grievors.

13. In this regard, the Board does not doubt from the evidence that the respondent had, for some time prior to the terminations, been contemplating the possibility of contracting out. Even the evidence of those of the grievors who testified bears this out. There was, however, no concrete step ever taken in that direction following receipt of the August estimate, until after the disclosure of the grievors' union activity. If the respondent was indeed serious about making the change to an outside contractor, the logical time to have turned its mind to that question, recognizing as it did its "fiduciary" rule towards its tenants, would have been in November or December when it was making up the cost estimates on which the tenants' payments for the next twelve months would be based. At that point in time the respondent had in its possession all but the last month's cost sheet, and the Board notes there was no extraordinary cost development in the month of December which would have caused the respondent to view the situation any differently in January than in December (the actual costs for maintenance and security were in fact *less* than the budgeted costs for the month of December). Mr. Demont admitted on cross-examination that the respondent's own monthly cost sheets were quite accurate and tended to correspond very closely with actual year-end figures, so that it is difficult to accept that it was the absence of the auditor's statement alone which held up the respondent's business decision. Nor, on the evidence, does receipt of the auditor's statement provide a clear outer limit within which implementation of the decision would necessarily have occurred.

14. As indicated, Mr. Demont stated that he really came to the conclusion in mid-January, after talking to Mr. Allen, to proceed with the contracting-out. There is, however, as the complainant points out, absolutely no documentation going to Mr. Allen, the tenants, the contractor, or anyone else to confirm or clarify the extent of the respondent's thinking in January on the subject of contracting-out. More importantly, the Board notes from Mr. Demont's examination-in-chief that there was no mention whatever of Mr. Demont taking in January the same obvious step he took on February 15th (when he was clearly serious about contracting-out), and that was to telephone Rick Cassidy to see if his August estimate had changed. It was only during cross-examination, when the complainant's counsel began to focus on this point, that any mention of a January telephone call to Mr. Cassidy emerged.

15. The Board finds, therefore, on all of the evidence, that it was not until February 14th, following disclosure of the grievors' union activity, that the decision to contract out actually crystallized. Given the "inertia", as Mr. Allen put it, characterizing the respondent's action in this regard prior to February 14th, it is impossible to speculate when, if ever, the decision to actually make the change would have been made, in the absence of Mr. Petti's revelation. It is, of course, sufficient to support a complaint such as the Board has before it if the employer has acted even *in part* in response to lawful union activity. As stated in the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, at paragraph 17:

“Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons, and second that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

16. We find that the decision to contract out the maintenance and security work, and to terminate the grievors, was made over the course of February 14th and 15th, and was motivated at least in part by the grievors’ union activity. The respondents’ actions, therefore, were a breach of at least section 58(a) of *The Labour Relations Act*. The grievors therefore were wrongfully terminated effective the end of February, and that termination continues to date. The Board accordingly directs that the grievors be reinstated in their former employment with the respondent forthwith, and be compensated for the value of wages and benefits lost as a result of their termination, with interest on the basis set out in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35. The Board is not satisfied that the circumstances in this case are such as to cause it to award in addition any special damages to the complainant, as requested by their counsel. The Board will remain seized on the issue of compensation to the grievors, in the event the parties are unable to reach agreement in that regard.

1182-79-U Joseph William Martin, Complainant, v. General Motors of Canada Limited, Respondent.

Health and Safety – Employee alleging entire plant unsafe – Evidence establishing employee not concerned over health or safety – No evidence to establish basis for refusal to work

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Harry Kopyto for the complainant; E. T. McDermott for the respondent.*

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL; May 22, 1980

1. This is an application under “Bill 139” – *The Employees’ Health and Safety Act*, 1976, S.O. 1976, c. 79. The complainant, Joseph William Martin, contends that he has been penalized and subjected to a concerted campaign of discrimination and harassment because, on December 28, 1978 he filed a complaint against the respondent alleging a breach of section 9 of *The Employees’ Health and Safety Act*. In particular, the complainant contends that he has been improperly disciplined, transferred to another shift, pressed to supply explanations for his absenteeism when none were requested previously, and continually ordered to wear hearing protection when, in his view, no protection was required. The statutory provisions relevant to this complaint are as follows:

“2. Where an employee in a work place has reasonable cause to believe that a machine, device or thing is unsafe to use or operate because its use or operation is likely to endanger himself or another employee or a place in or about a work place is unsafe for him to work in, or the machine, device thing or place is in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973* or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, the employee may refuse to use or operate the machine, device or thing, or work in the place.

3. (1) Where an employee in a work place refuses to use or operate a machine, device or thing or refuses to work in a place therein because he has reasonable cause to believe that the machine, device or thing is unsafe to use or operate because its use or operation is likely to endanger himself or another employee or the place is unsafe for him to work in, or the machine, device, thing or place is in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act* or any regulations thereunder, as the case may be, he shall forthwith report the circumstances of the matter to his employer or the person having control and direction over him who shall forthwith investigate the report in the presence of the employee and, if there is such, in the presence of either a health and safety representative, a committee member who represents employees, or a person authorized by the trade union that represents the employee.

(2) Where the employer or the person having control and direction over the employee disputes the report or takes steps to make the machine, device, thing or place safe or comply with *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, and the employee has reasonable cause to believe that the machine, device or thing is or continues to be unsafe to use or operate because its use or operation is likely to endanger himself or another employee or the place is or continues to be unsafe for him to work in or the machine, device, thing or place is or continues to be in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, he may continue to refuse to use or operate the machine, device or thing, or work in the place unless a collective agreement binding the employees expressly provides otherwise.

(3) Where the employee continues to refuse to use or operate the machine, device or thing, or work in the place or having returned to work in compliance with the express provisions of a collective agreement binding the employee files a grievance concerning his right to continue to refuse to use or operate the machine, device or thing or work in the place, the employer or person having control and direction over the employee shall notify an appropriate inspector or an engineer, as the case may be, who shall investigate the matter in the presence of the employer or the person having control and direction over the employee, the employee and, if there is such, either a health and safety representative, a committee member who represents employees or a person authorized by the trade union that represents the employee.

(4) The inspector or engineer shall, following his investigation, make a decision whether the machine, device or thing is unsafe for the employee to use or operate or the place is unsafe for the employee to work in or the machine, device, thing or place is in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973* or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be.

9. (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss an employee;
- (b) discipline or suspend or threaten to discipline or suspend an employee;
- (c) impose any penalty upon an employee; or
- (d) intimidate or coerce an employee,

because the employee has acted in compliance with this Act.

(2) Where an employee complains that an employer has contravened subsection 1, the employee may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply *mutatis mutandis* to the complaint."

2. The hearing in this matter consumed some ten days. During that time the Board heard the evidence of a number of individuals, including officials of the respondent and the UAW – the trade union representing the complainant. The complainant gave evidence on his own behalf for almost three full days. Having regard to the demeanor of the various witnesses, the manner in which they gave their evidence and their relative credibility, we are satisfied that we should generally accept the evidence of the respondent's witnesses wherever that evidence is in conflict with that of the complainant. His statements were inconsistent, and were contradicted on material points by the evidence of all of the other witnesses. It is understandable that an individual might not have a perfect recall of events which occurred some months previously and which might not have seemed significant at the time; however, on numerous occasions Mr. Martin gave clear, definite and precise answers, which he subsequently varied, contradicted or denied. In the circumstances, except as expressly noted hereunder, we are able to give his evidence little weight.

3. There is little doubt that there is considerable animosity between the complainant and the respondent's officials, and that they regard him as a difficult employee. His defiant and hostile attitude was evident in the manner in which he gave his evidence. His answers were often frivolous or sarcastic – even in response to questions from his own counsel. He asserted that he didn't trust any of the respondent's managerial personnel since they were all "liars". In his view, anyone who was not an hourly-rated employee was, *ipso facto*, a liar. He "didn't do the company any favours" since he "owed the company nothing"; and didn't owe E. G. Williamson (the personnel supervisor) "the time of day". He said that, occasion-

ally, "I would go out of my way to be insubordinate", and agreed with counsel that he often had a rude and insolent attitude. He took things absolutely literally when it suited his purpose to do so, and he acknowledged that he would taunt Frank Matthews, the general supervisor, whenever he thought he could get away with it. In the grievor's opinion, Matthews was a "stupid little man", and Ed Egan, the foreman, was "even stupider" and "not worthy of sarcasm". The grievor told the Board that he was not "good at sarcasm, but practice makes perfect", and he had been "practising over the last year". The complainant testified that he would file a grievance if he even "imagined" that the company might be wrong. In this respect his evidence is corroborated by that of the various trade union witnesses. The complainant was a prolific grievor. Frank Douglas, the union committee man, testified that Mr. Martin was the most prolific grievor in the plant, and filed more grievances than all of the other employees in the zone put together. Most of these grievances have been withdrawn or abandoned because they were regarded as without merit. It was clear to the Board that many of the complainant's problems are of his own making and are directly related to his attitude to his supervisors.

4. The complainant has been employed as machine repairman at the respondent's Scarborough van plant since December, 1976. There are approximately three thousand employees working at the plant. All employees working in the plant area are required to wear eye protection, and there are a number of "mandatory hearing protection" areas. The respondent supplies various kinds of hearing protection, including Bilsom earplugs and "ear-muffs". There is a joint Union/Management Health and Safety Committee, and a full time health and safety representative. Each union zone committee man has a particular day designated to perform health and safety inspections. There are monthly safety meetings, established rules, and training films designed to promote safety in the work place. By and large, the company has sought to achieve safety objectives by discussion and persuasion rather than discipline and threat. There is an on-site medical facility with a resident nurse and doctor, who treat individuals who are injured or ill on the job, and examine persons returning from sick leave before they go back to work.

5. A machine repairman is a skilled tradesman who, as the name suggests, is responsible for the installation, maintenance and repair of mechanical devices. There are a number of machine repairmen in the maintenance department, including the grievor. The department is divided into two "crews": the construction crew which installs and repairs equipment when the assembly line is shut down; and the "service crew" which makes "on-line repairs" while the assembly line continues to operate. Some employees consider the construction crew preferable because it permits the full exercise of trade skills, while others prefer the service crew because there is more overtime available. Until November, 1978, the complainant worked on the construction crew. There is no question that he is a competent machine repairman, and prior to November, 1978 his conduct and attendance were considered satisfactory.

6. The events giving rise to the present complaint can be traced to November 1978, and a series of incidents which evidenced, or resulted in, a profound change in the grievor's attitude towards the respondent. In November 1978, there was a significant deterioration of the employer-employee relationship. The grievor began to exhibit the hostile, rebellious and insolent attitude, to which we have already referred. It may be useful to examine these incidents in some detail, for in them one can discern the origin of a conflict which subsequently assumed more serious proportions.

7. On November 27, 1978, Martin reported for work and complained of intense pain resulting from a welding flash (eye injury) which he had suffered the previous day. He was referred to the plant medical department, but refused to permit the plant doctor to examine, or treat him. This refusal, he advised the Board, was based upon his poor opinion of the medical staff – although he admitted that he had had no previous contact with these individuals. Martin demanded that the company send him to St. Michael's Hospital so that he could be treated by "a doctor of his choice". He conceded, however, that there was no particular physician whom he wished to see, he was simply asserting his "right" to go to the hospital of his choice. Martin advised the Board that, in his view, he was entitled to be sent to the hospital of his choice even if it were fifty miles away, and further that he might well choose another hospital next time. The respondent offered to send him by taxi to Scarborough General Hospital, which was both the closest hospital, and the one to which the respondent usually sends injured employees. This was not acceptable to Martin, who continued to demand that he be sent to St. Michael's Hospital. Eventually he left the respondent's premises claiming that he would walk to the hospital (12 miles away) despite the driving snowstorm which was occurring that day.

8. Martin testified that he had no particular complaint against the staff of Scarborough General Hospital, but he regarded it as a "company hospital" because the plant manager was on the Board of Directors. He told the Board that he was also concerned because the Minister of Labour had privileges there, and that this would ensure that the hospital was prejudiced in favour of the company. Two months later (on February 1, 1979) he again had occasion to seek medical attention. He was given a pass out of the plant so that he could visit a doctor of his own choosing. Martin testified that he was suffering from headache, was in great pain, and had to get to a hospital quickly. He chose to go to Scarborough General Hospital. In the circumstances, it is difficult to accept that Martin's expressed concern about the hospital was *bona fide*.

9. On November 30th Martin reported for work at 7:00 a.m., was cleared to return to work by the plant medical department, and upon doing so asked for a meeting with his trade union representatives. While he was waiting for them to arrive, he repaired a smoke monitor on the plant ceiling. When the trade union officials appeared, he advised them that he intended to invoke Bill 139, and refuse to work because the "entire plant was unsafe". The plant was unsafe, in his view, because, if he were injured, the company would not send him to the hospital of his choice (only, it would appear, the closest one) The trade union officials were incredulous. They advised Martin that an employee could only refuse to work if there was reasonable cause, that it would be difficult to demonstrate that the entire plant was unsafe, and that if there was no reasonable cause he might be subject to discipline. Nevertheless, Martin refused to work. He told Frank Matthews, the general foreman, that if he tripped, or was hit by a forklift truck, or suffered a welding flash, the company would not send him to the hospital of his choice and "consequently" the plant was unsafe. Matthews and Pat Cowling from the respondent's labour relations department, attempted, without success, to reason with the complainant. They advised him that there was no reasonable cause for his refusal to work and that "reasonable cause" was a condition precedent to the exercise of the right to refuse under Bill 139. In this respect, the advice of these management officials was similar to that of the trade union representatives, but Martin persisted. Matthews and Cowling directed that, until the issue of the plant's safety was resolved, Martin should work outside the plant shovelling snow. Again, he refused, claiming that if he slipped on ice and injured himself the company would not send him to the hospital of his choice;

“therefore”, it was unsafe to shovel snow. At this point, in obvious frustration, Cowling fired the complainant for insubordination.

10. At no time on November 30th did the complainant specify any device, thing or area of the plant which was unsafe. His sole complaint was that *if* he were injured, the respondent would not send him to the hospital of his choice. Throughout this entire sequence of events the grievor was laughing or wearing an amused smile. He was obviously pleased at the foremen’s discomfiture, and believed at that time, that he could not be disciplined unless or until an inspector from the Ministry of Labour visited the plant. We are satisfied that the grievor had no reasonable grounds to believe the plant was unsafe, nor did he in fact believe that there was any safety hazard. He may have believed that he could not be disciplined if he purported to act under Bill 139; but we are satisfied that he did not honestly believe that there was any threat to his safety.

11. The following morning a meeting with Ministry of Labour officials was convened pursuant to section 3(4) of *The Employees’ Health and Safety Act*. The respondent telephoned Martin to notify him of this meeting. Martin advised the respondent that he would not attend unless the respondent sent a taxi to pick him up. Martin lives within easy walking distance of the plant. No taxi was sent.

12. The meeting convened about 9:00 a.m. Martin was in attendance, as was Jack Brennen, the plant chairman of the union, Frank Douglas, the union’s zone committee man, various company officials, including Pat Cowling and Ed Williamson from the personnel department, the personnel director, and two representatives from the Ministry of Labour. After dealing with certain “preliminary objections” which Martin raised, (a request that his lawyer be present, a request to tapercord the meeting, and a request that the meeting be moved to “neutral territory”) the Ministry of Labour Inspector began to question him about the alleged unsafe plant condition. Martin repeated what he had said before, then refused to discuss the matter further because he had been fired, and, in his view, was no longer an employee within the meaning of Bill 139. In order to expedite the discussion, the personnel director reinstated him forthwith. At this point Martin commented (with a derisive laugh as if the entire affair was a joke) “I now declare the plant safe, it’s as safe today as it was yesterday.”

13. The company officials were astounded and angry, but were content, at that time, to simply notify Martin of possible future discipline. In his evidence before the Board, Martin himself admitted that he realized that he had gone too far and might have to “back off”. He told the company he was not prepared to work the rest of that day, nor did he wish to work overtime on the following weekend.

14. Martin eventually returned to work on December 8th and on December 19th was given a five-day suspension for refusing a reasonable request to work. In the circumstances, this penalty cannot be considered unreasonable and is not a breach of *The Employees’ Health and Safety Act*. On December 27, 1978 Martin filed a complaint alleging that he had been dealt with contrary to section 9 of *The Employees’ Health and Safety Act*. This complaint was eventually adjourned *sine die* (by a decision of the Board dated January 17, 1979).

15. On, or about, December 18, 1979, the complainant was transferred from the con-

struction crew to a line (service) crew to replace an individual who was disabled. There are no contractual restrictions on transfers of this kind. None of the other employees wished to transfer, and the grievor had the lowest seniority. We are satisfied that the grievor's transfer was properly made in accordance with his seniority and the terms of the collective agreement. There was no improper motive and no breach of Bill 139.

16. The grievor raised no immediate objection to his transfer but two weeks later, on January 3, 1979, he filed a grievance alleging that the transfer was contrary to the collective agreement. Before this Board he contended that the transfer was a penalty or a reprisal for filing a complaint under Bill 139. There is no foundation whatsoever for this contention. The respondent did not receive notice of the complaint until January 4, 1979 – well after the transfer had taken place.

17. The grievor testified that work on the service crew was less desirable because of the frequent requirement to work overtime. While this may well be a legitimate concern, it is curious in the context of this complaint, for one of the grievor's contentions is that he has been *denied* the opportunity to work overtime on several occasions. He alleges for example that Ed Egan, a foreman, denied him the opportunity to work overtime on December 30th and December 31st. We are satisfied that Egan approached Martin to see if he wished to work overtime, Martin said he would let him know later and then failed to advise him further. Before this Board Martin testified that, in any event, he had no wish to work December 30th. The allegations respecting lost overtime opportunities are patently without foundation.

18. In January, Martin missed all or part of twelve working days; and in February, he missed some sixteen working days. This was the beginning of a serious absenteeism problem which prompted a concern on the part of the respondent about the reasons for these many absences. From December 1, 1978 to October 10, 1979, Martin worked only forty-four out of a possible 208 working days.

19. On February 1st Martin complained of headaches, and was sent to the nurse. He refused treatment. The nurse sent him back to work, and Fred Matthews gave him a personal pass to leave work. It was on February 1st that he apparently went to Scarborough General Hospital – the hospital which he had considered totally inadequate just two months before. Martin was off work without reason from February 2nd to February 16th. February 16th marked the beginning of his alleged difficulties with the company's ear protection policy and a series of events which he characterized as harassment.

20. When Martin was hired in 1976, he was examined by the company doctor, and advised that his hearing was impaired. He was told that hearing loss would increase with exposure to noise, and that he should wear ear protection at all times. There are no quiet areas in which a machine repairman can work. The nature of the job involves exposure to considerable noise. A number of areas in the plant are designated as "mandatory hearing protection areas" for all employees, but Dr. Doke, the company doctor, testified that, in his view, Martin should wear hearing protection at all times. Martin admitted that this view was confirmed by his own doctor and the specialists that he consulted. All of them agreed that he had a hearing problem and to safeguard his health, he should wear hearing protection. While Dr. Doke's evidence was uncontradicted and corroborated by Martin's own doctors, Martin himself asserted that it was his right to wear hearing protection when, and where he pleased,

since it was his hearing which could be damaged. He testified that he was willing to “take a chance”. The respondent was not. The company believed it had both a moral, and legal obligation to safeguard the health of its employees (in this regard see *The Industrial Safety Act*, sections 24, 26, 27 and 29).

21. The events of February and March reveal a pattern of periodic absences, and a continuous dispute with his superiors over the wearing of hearing protection. It is unnecessary to review each aspect of this dispute. We are satisfied that the company made considerable, *bona fide*, efforts to find a form of ear protection which was suitable for the grievor, while the grievor remained insistent on his right to determine when ear protection should be worn. The grievor’s refusal to comply with the company’s rule was accompanied by a flood of grievances. During this period there was what might best be called a “running battle” between the grievor and his supervisor. Sometimes the grievor refused to wear one form of hearing protection or another; sometimes he refused to wear it altogether, and on one occasion he persisted in wearing two forms of hearing protection at once – with the result that he was unable to hear well enough to perform his duties.

22. There was also a continuing dispute about the grievor’s attendance, and his refusal to supply adequate evidence that he was unable to work. The evidence strongly suggests that for at least some of this period, the grievor was intentionally malingering. On March 21st, after being reused a leave of absence by the medical department, Martin told Egan that because of his headaches he wouldn’t see him until mid-August. Although these headaches never lasted more than a day or two, Martin’s prediction turned out to be right. Except for a few hours on March 22nd, and a couple of days in mid-April, he was absent throughout this period. When asked in cross-examination about this apparent coincidence, Martin testified that it was “just a lucky guess.”

23. On March 22nd Martin appeared for work, filed a grievance, and left early because he said he was ill. This grievance involved the events of March 20th. Martin had not been answering the whistles which signal the need for a machine repairman. Egan found him sitting in the tool crib and, since Martin said he couldn’t hear the whistles, Egan told him to make himself visible, and walk up and down the aisle so that he would be available if needed. Martin consequently filed a grievance alleging harassment, and at the same time, claimed that the aisle was unsafe (relying on Bill 139). Yet he also asked that a chair be placed in the aisle for him. Before this Board he remarked that he simply didn’t like walking, and that his next request would have been for a soundproof room. This incident was typical of the events in that period, and aptly illustrates the complainant’s frivolous and facetious attitude. We are satisfied that there is no impropriety on the company’s part with respect to the wearing of hearing protection.

24. On April 19th the grievor appeared with a note from his doctor advising that he should wear hearing protection. Again, he would not let the company doctor examine him, declaring that his health was “none of his business.” Williamson advised the grievor that there was no work available for him which did not require the wearing of hearing protection. The possibility of janitorial work was discussed but not pursued. The grievor was not being disciplined or suspended, and was so advised. It was simply that there was no work available. This incident subsequently led to a complaint before The Labour Relations Board that the grievor had been unlawfully “locked out”. There was, however, nothing improper in the company’s conduct.

25. The respondent heard nothing further from the grievor until July 31st, when it received a telephone call from a Mrs. Croft of a local unemployment insurance office requesting details of "Martin's layoff". Williamson advised Mrs. Croft that there was, and had always been, work available if Martin was able to wear ear protection. In response, Martin sent a telegram indicating that he was "anxiously awaiting recall." By letter dated July 31st, the respondent advised Martin that he should report for work on the evening of August 1st. This letter contained an error with respect to his starting time. A second letter was delivered correcting the error, and Matthews telephoned Martin at 8:00 a.m. to inform him of the time when Martin should report that evening. Martin refused, with a comment which he seems to freely and frequently use to all his superiors. He said, "no fucking way". (It should be noted that the grievor had not been disciplined for his free use of profanity – even when he told the superintendent of labour relations to "go fuck himself." Apparently the respondent considers this to be merely "shop talk" and not a matter for discipline.)

26. When the complainant reported for work on August 1st (at the time stated in the original letter which he knew to be incorrect) he wrote out several grievances and was assigned to the mill room. Shortly thereafter he was nowhere to be found, and after a brief search by the evening supervisor was eventually discovered in the cafeteria area. He was put on notice of discipline, and subsequently given permission to leave work because he said he was too ill to work. He returned on August 27th and received a three-day suspension.

27. The complainant's erratic attendance continued even after the filing of the present complaint. On September 19th he left work early complaining of high blood pressure, and did not return to work until October 9th. On October 9th there was some confusion respecting his status. Matthews believed that he had terminated his employment in accordance with section 54 of the collective agreement. Matthews was unaware that Martin had already been cleared to return to work by Ed Williamson, and Martin did not tell Matthews that this was the case. Accordingly, Matthews sent Martin home. When he discovered his mistake he telephoned Martin, asked him to return to work, and told him he would be paid for his full shift. Martin hung up several times, and told Matthews he was going on holiday. Subsequently, Williamson telephoned, recognized Martin's voice, and also asked him to return to work. Martin identified himself as a relative and said that he (Martin) was out. The following morning Martin requested the decidamtype earplugs; but subsequently confronted Matthews, told him he was not going to wear ear protection and demanded to know what he intended to do about it.

28. It might be noted that the recollection of Egan and Matthews was assisted by notes which they had made contemporaneously with the events in question. These notes had been made after the events in November, when they (correctly) assumed that Martin's subsequent conduct, and the company response might give rise to grievances. As it turned out there were numerous grievances – only some of which have been mentioned herein. Moreover, after the first Bill 139 complaint, counsel suggested that it would be prudent to keep complete notes in the event that there was a proceeding before this Board. We are satisfied that there is nothing sinister in the respondent's desire to keep a careful record of the complainant's conduct.

29. Under Bill 139 the legal onus lies upon the respondent to demonstrate that it has not contravened the Act. To meet this onus the respondent makes two submissions which for ease of reference it referred to as its "legal argument" and its "evidentiary argument".

30. The respondent argues that on November 30, 1978 Martin did not have an honest and reasonable belief that the entire plant was unsafe, nor was he acting in compliance with the Act on that day. In the respondent's submission, both the earlier Bill 139 complaint, and the present one are frivolous, vexatious, and entirely without merit. The respondent further contends that even if the complainant were able to demonstrate that he has been penalized for filing a Bill 139 complaint, that is not a substantive offence under *The Employees' Health and Safety Act*. The respondent points to the language of section 71 of *The Labour Relations Act*, and section 24 of *The Occupational Health and Safety Act* – both of which create a specific offence in this regard.

31. We have carefully considered the respondent's "legal argument", but we are satisfied that it is unnecessary for us to express any opinion on its merits. Before such question arise, it must be established, on the evidence, that the subject employee has been penalized because he has exercised rights or has sought a remedy under the Act. We are satisfied that such is not the case here.

32. The respondent came forward with affirmative evidence establishing a credible explanation for its conduct free from any improper motive. Indeed, the respondent has acted with moderation and restraint in the face of considerable provocation. The evidence disclosed numerous occasions of flagrant insubordination, abusive language, defiance and rudeness to all of the management persons with whom the complainant had contact. The complainant freely acknowledged his antagonism and hostility, and openly admitted that he would taunt his superiors if the thought he could get away with it. It is apparent that much of his conduct was intentionally irritating and designed to goad his superiors into a reaction. The weight of the evidence suggests that the complainant was not seeking to further a legitimate concern for his health or safety, but rather was seeking to antagonize and aggravate the respondent.

33. We do not reach this conclusion lightly for the rights guaranteed by Bill 139 are critically important to all employees. The concept of insubordination is singularly inappropriate in situations where an employee is refusing to work in an honest (although mistaken) belief that his health or safety may be threatened. We accept the view, so accurately expressed by Doke, that in such matters one should err on the side of caution and prudence. An employee should not be penalized for doing so, nor should this Board be unduly concerned if *bona fide* concerns for employee safety result in occasional disruptions of the employer's production process. In the present case, however, there is not only no evidence to sustain the complainant's original refusal to work, but we are satisfied that there has been no pattern of harassment referable to the December 28th complaint. Despite considerable provocation, the employer's response has been a measured one, which was not out of proportion to the degree of the complainant's misconduct.

34. In the result, we are satisfied that there is no merit to any of the complainant's charges. The application is therefore dismissed.

DECISION OF BOARD MEMBER O. HODGES:

The decision of Board Member O. Hodges will follow shortly.

2155-79-R United Food and Commercial Workers International Union, A.F.L., C.I.O., C.L.C., (Applicant), v. **Hostess Food Products Limited**, (Respondent), v. Group of Employees, (Objectors).

Certification – Petition – Objecting employees seeking to file additional petitions after terminal date – Board declining to extend terminal date – Additional evidence of objections obtained after terminal date.

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members G. Bourne and M. J. Fenwick.

APPEARANCES: James K. A. Hayes, Vincent Gentile and Julius Hobeink for the applicant; C. G. Riggs, A. Johnson and D. King for the respondent; Stephen W. Peglar and A. Crowder for the Objectors.

DECISION OF THE BOARD; May 14, 1980

1. This is an application for certification. By a decision dated, March 21, 1980 the Board established the applicant's status as a trade union, determined a unit of employees appropriate for collective bargaining, and found that more than 55% of the employees in that unit were members of the applicant on the terminal date (February 28, 1980) fixed pursuant to Sections 7 and 92(2)(j) of *The Labour Relations Act*. There was also before the Board a "petition", signed by a number of employees who object to the applicant's certification. The representative of these objecting employees advised the Board that, since the filing of the original petition (which was filed by the terminal date) two other employees have decided that they also wish to oppose the union. He sought to introduce two handwritten statements to this effect, and requested the Board to treat these statements as if they had been part of the original petition. Essentially, the representative of the objecting employees was asking for an extension of the terminal date for the purpose of admitting two statements of objection which would otherwise be untimely. It is clear that unless the Board is satisfied that the terminal date should be extended, the trade union will be entitled to certification without recourse to a representation vote.

2. The terminal date in the instant case was set by the Registrar, pursuant to Section 2 of the Board's Rules of Procedure (R.R.O. 551 as amended):

"2. When an application is made, the registrar shall fix a terminal date for the application which shall be *not less than five and not more than ten days, as directed by the Board, after,*

- (a) the day on which the registrar serves the employer with the notice of application for posting, where they are served personally; or
- (b) the day immediately following the day on which the registrar mails the notices of application to the employer for posting, where they are served by mail." [emphasis added]

The documents relating to the application were mailed to the respondent on Thursday, February 21, 1980 and the terminal date was fixed at February 28, 1980. These documents in-

- (2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection 1."

4. The requirements of Rule 48 are mandatory. Unless the evidence of membership in, or objection to, the union is filed in a timely fashion, the Rule provides that it "shall not be accepted." The Board has the power to vary the terminal date pursuant to section 57(2) of the Rules, however this is not a power which should be exercised lightly. It is essential that there be one clear point in time, at which the Board can ascertain the views of the employees, and make the determinations required by section 7 of *The Labour Relations Act*. This is done by fixing a terminal date pursuant to section 92(2)(j) of the Act, (see *R. v. O.L.R.B. Ex Parte Hannigan*, (1967), 64 D.L.R. (2d) 117 (OCA)) and clearly advising all of the parties that material must be filed by that date.

5. If applications for certification are to be dealt with expeditiously and equitably, it is important that the terminal date provide a firm benchmark for all of the parties affected by the application; although this does not mean that the terminal date is entirely inflexible. In exercising its discretion to extend the terminal date the Board has adopted an approach which is sensitive to the particular circumstances of the case. In *Kilean Lodge Incorporated* [1977] OLRB Rep. April 240 the Board commented:

"The Board's approach in such cases has been to avoid fixing any rigid formula to determine whether the employees in any given application have been given adequate notice. Where a request for an extension of the terminal date is made the Board prefers to assess the merits of each request in the light of the particular fact surrounding it. Among the things the Board takes into account are:

1. The number of days the notice was posted.
2. The manner in which it was posted, including the frequency of locations of posting on the respondent's premises and whether it was sent to employees individually by mail.
3. The number of employees in the bargaining unit and the frequency of their presence on the premises during the time of posting, having particular regard to shifts and days off.
4. Whether any delay in posting is attributable to the employer.
5. Whether the request for an extension is made by the employer alone or by a group of employees. This may be especially relevant where employees have made no request for an extension of time and posting was delayed by the employer's own conduct.

(see, generally: *Lanark Mills Ltd.* [1965] OLRB Rep. Aug. 356 *Joesug Realty Ltd.* [1966] OLRB Rep. July 278; *The Breithaupt Leather Company*

Limited [1966] OLRB Rep. Dec. 734; *Dominion Sport-Service Limited* [1967] OLRB Rep. June 266; *J.H. McNairn Limited* [1973] OLRB Rep. Feb. 90).”

6. The union’s organizing campaign took place in the weeks immediately preceding the certification application. The respondent was aware of that campaign and posted at least three notices (dated February 14, February 15, and February 19,) setting out its views, and explaining the certification process and the “qualifying percentages” needed for a representation vote, or “automatic certification”. The notices were posted adjacent to the employees’ coffee machine, and managerial personnel directed the employees’ attention to them. The Form 5 notice was posted on February 25, 1980 in the same location. As the employees were coming in to work the following morning, managerial personnel specifically directed them to read it. Roger Sanche and Jack Boot, (the two employees who subsequently registered a “late” objection) testified that they had a full opportunity to read the form, and had in fact done so. Sanche acknowledged that he knew the form was from the Labour Relations Board, and dealt with the union’s certification – although he may not have read it carefully.

7. In response to the Form 5 notice, Allan Crowder drafted a petition in opposition to the union, and began to solicit signatures. Crowder testified that he approached almost all the respondent’s 23 employees, including Boot and Sanche. We are satisfied that Crowder had ample opportunity to canvas the employees, and solicit the support of those who objected to the union. Both Boot and Sanche were aware of Crowder’s activities, although neither signed the petition at that time. Crowder also spoke to Sanche about the union by telephone on the evening of February 27.

8. As he was soliciting signatures, Crowder carried a copy of the Form 5 notice with him. Crowder asked each individual whether he was in favour of or opposed to the union’s certification. If the employee indicated his opposition, Crowder showed him the Form 5 notice, and asked him to sign the petition. The petition was properly filed by the terminal date, as was all of the union’s membership evidence. The letters of opposition from Sanche and Boot were written on March 10, 1980, and were presented at the hearing on March 14th. Neither Boot or Sanche were present for the hearing on that date.

9. On the basis of the evidence before it, the Board is satisfied that it should not exercise its discretion under section 57(2) of the Rules to extend the terminal date. It is evident that the employees on whose behalf such request is made had a full opportunity to read, and did in fact read, the Form 5 notice. Both individuals had the opportunity to sign Mr. Crowder’s petition, and thereby record their opposition to the union in a timely fashion. A number of their fellow employees did so. In the circumstances of this case we do not think it is necessary to extend the terminal date for the sole purpose of admitting an otherwise untimely statement of objection. Accordingly, having regard to the timely evidence of membership in, and objection to the trade union the Board is satisfied that more than 55% of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 28, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. The Board declines to exercise its discretion to order a representation vote.

11. A certificate will issue to the applicant.
12. It should be noted that Board Member C. G. Bourne concurs in the result, but may issue a separate opinion or supplementary comments at a later date.

2338-79-R The Employees of Jan Peters Trucking and Excavating, Applicant, v. International Union of Operating Engineers, Local 793, Respondent, v. **Jan Peters Ltd.**, Intervener.

Construction Industry – Termination – Application filed in respect of ICI sector only – Whether termination of bargaining rights province wide or in single board area – Effect of *The Labour Relations Amendment Act, 1979*

BEFORE: D. E. Franks, Vice-Chairman, and Board Members C. A. Ballentine and J. D. Bell.

APPEARANCES: *Robert A. Woodrow for the applicant; J. Redshaw and G. McLeod for the respondent; no one appearing for the intervener.*

DECISION OF THE BOARD; May 13, 1980

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2. This is an application for a declaration terminating bargaining rights pursuant to section 49 of *The Labour Relations Act*. In the application the applicant employees have described as the unit of employees for which they are seeking the declaration as follows:

“Engaged in operating excavating equipment, shovels, bulldozers and similar equipment used in the excavating of Industrial, Commercial and Institutional building sites. Work carried out is usually within the Regional Municipality of Waterloo and occasionally in the cities of Guelph, Stratford and Woodstock.”

The respondent in this matter has filed a copy of a collective agreement dated November 13, 1978 between Jan Peters Limited and the International Union of Operating Engineers, Local 793. The recognition provision of that collective agreement is as follows:

“Article I – RECOGNITION

- 1.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer covered by the classifications set out in this Agreement, save and except non-working foreman and persons above that rank, working in the Counties of Wellington and Waterloo. In areas other than the above counties, wage agreements for all construction on and off site, will apply.”

3. The respondent's position is that conciliation was applied for under the "Local agreement" on December 20, 1979, and on January 16, 1980 a conciliation officer was appointed. Subsequently, a "No Board" letter was issued with respect to the "Local agreement". With respect to the provincial agreement which terminates on April 30th, a conciliation officer was appointed on March 3, 1980. The respondent objects to the notion of an application for termination of bargaining rights relating to a sector and argues that both agreements apply in this matter and that this application is untimely with respect to both agreements. The present application was mailed registered on March 12, 1980. Clearly, with respect to the Local agreement, such an application would be untimely being after the appointment of a conciliation officer. However, with respect to the provincial agreement relating to the industrial, commercial and institutional sector of the construction industry, the application is clearly timely, being within the last two months of the provincial agreement. Although the collective agreement filed in this matter does not make reference to any sector, clearly the bargaining rights held by the union with respect to the intervener employer tie the employer into the provincial agreement under *The Labour Relations Act* for the industrial, commercial and institutional sector. That agreement arises by operation of law rather than as a result of any specific agreement between the employer and the respondent trade union. The effect of the amendment of *The Labour Relations Act* in S.O. 1977, c. 31 was to create a specific bargaining relationship between the respondent trade union and the employer for the industrial, commercial and institutional sector (see section 132(4)). For that sector, the relationship is that of the "provincial agreement" as defined by section 125(e). With respect to any other sector in the construction industry, the parties are at liberty (subject to any accreditation rights) to create a specific bargaining relationship. Thus, the employer in this case is subject to two separate bargaining relationships with the respondent. As noted above, this application was made with respect to employees in the industrial, commercial and institutional sector of the construction industry. Notwithstanding the object by the respondent trade union to termination of bargaining rights in one sector, it is clear that this application is timely only with respect to that sector. In this regard the Board, in previous cases, has dealt with bargaining rights in one sector only. See, for instance, *Malen Steel & Salvage Company Limited*, [1978] OLRB Rep. May 435, where the Board ordered a vote of employees within the industrial, commercial and institutional sector of the construction industry in a displacement certification case upon a finding that the application for certification was timely only for the employees employed in the industrial, commercial and institutional sector of a multi-sector collective agreement. Therefore, notwithstanding the objection of the respondent, there are no grounds for refusing to proceed with this application.

4. In their application, the applicant employees have referred to a geographic area of the Regional Municipality of Waterloo and the Cities of Guelph, Stratford and Woodstock. The geographic area in the collective agreement filed by the respondent trade union is for the Counties of Wellington and Waterloo. Although this application was made on March 12, 1980, the effective date of any declaration made on March 12, 1980, the effective date of any declaration made by the Board in this case would be the date of the final decision in this matter. We must therefore take into account the effect of the recent amendment to *The Labour Relations Act* enacted as Bill 204, S.O. 1979 c. 113. That amendment takes effect on May 1, 1980 and contains the following provision:

- "1. Section 125 of *The Labour Relations Act*, being chapter 232 of the Revised Statutes of Ontario, 1970, as enacted by the Statutes of Ontario,

1977, chapter 31, section 3, is amended by adding thereto the following subsection:

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause *e* of section 106, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights."

The effect of this provision is to extend by operation of law recognition of the respondent trade union from the Counties of Waterloo and Wellington to the whole of the Province of Ontario, that is, the geographic jurisdiction of Local 793, but only for bargaining rights in the industrial, commercial and institutional sector of the construction industry. Since the bargaining unit in the provincial agreement affecting the employer in this case has been modified by operation of law, we are of the view that the correct bargaining unit for termination purposes in this application is the bargaining unit as amended by section 125(2). To suggest otherwise would lead to an untenable position. On May 1st the bargaining rights of the respondent became province-wide for the industrial, commercial and institutional sector of the construction industry. If this Board were to terminate bargaining rights for the Counties of Waterloo and Wellington, the bargaining rights would continue to exist for the remainder of the province and then the new subsection 2 of section 125 would deem those bargaining rights to extend recognition back into the Counties of Waterloo and Wellington. Clearly such a result would be to render this application meaningless. The applicant employees in this matter filed a petition signed by nine persons. The intervener employer filed lists of employees in Schedules "A" and "C". The Schedule "A" lists the names of the two employees who originated and circulated the petition. The Schedule "C" lists the names of nine other employees, all of whom had been laid off on or before February 8, 1980. Further, the layoff was for an indefinite period of time and apparently none had returned to work since this application was made. Accordingly, those on Schedule "C" were not considered for the purposes of the count in this application.

5. Both employees on the list of employees gave evidence as to the origination, preparation and circulation of their petition. In the course of giving evidence, one of the employees indicated that within the thirty days prior to the making of the application he had worked on both residential and commercial job sites. The other employee, however, was unable to supply the Board with any detailed evidence concerning his employment during this period.

6. The list filed in the present case related to the Counties of Waterloo and Wellington and the Board hearing was conducted on the basis of the situation with respect to those two Counties. Since we are changing the scope of this application to include the whole of the province, the parties will be given an additional fifteen days in which to make representations concerning any amendment to the list of employees filed in this matter.

7. In the event that there are no other employees of the employer in the industrial, commercial and institutional sector of the construction industry, the Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of Jan Peters Ltd. in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union as of March 26, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the Act.

8. The Board directs that a representation vote be taken of the employees of Jan Peter Ltd. Those eligible to vote are all employees employed in the industrial, commercial and institutional sector engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the maintaining and repairing of such equipment in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

9. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Jan Peters Ltd.

10. The matter is referred to the Registrar.

2150-79-R; 2131-79-U United Brotherhood of Carpenters and Joiners of America, Applicant/Complainant, v. **D. Kemp Edwards Limited**, Respondent, v. Group of Employees, Objectors.

Certification – Petition – Section 79 – Whether management influenced petitioners – Supervisor recently promoted out of bargaining unit in area where petition signed – Collector discharged for entering company premises at unauthorized times – Not exercising rights under Act – Whether anti-union motive underlying discharge

BEFORE: R. D. Howe, Vice-Chairman, and Board Members E. J. Brady and W. F. Ruth-erford.

APPEARANCES: *D. Wray, J. Nyman and T. Harkness for the applicant/complainant; W. T. Langley and Michael Edwards for the respondent; H. Hunter Phillips for the objectors.*

DECISION OF THE BOARD; May 29, 1980

1. File No. 2150-79-R is an application for certification. File NO. 2131-79-U is a complaint under section 79 which alleges that the grievor, Tim Wings, was dealt with by the respondent contrary to sections 56, 58, 61, 70 and 71 of *The Labour Relations Act*. In view of

the agreement of the parties that the evidence led before the Board would be applied to both files, the Board consolidated them.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. Having regard to the representations of the parties, the Board finds that all employees of the respondent employed at its plant in Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and security guards, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The applicant first applied to the Board to be certified as bargaining agent for employees of the respondent on February 4, 1980. On February 18, 1980, the applicant requested leave of the Board to withdraw that application and, on the same date, filed with the Board the present certification application. On February 19, 1980, another panel of the Board granted leave to the applicant to withdraw the initial certification application. March 5, 1980 was set as the terminal date for the present application which was scheduled for hearing on March 21, 1980. Membership evidence and a petition filed in connection with the initial certification application were transferred to the present application at the request of the applicant and the objectors, respectively. At the hearing on March 21, 1980, the Board disposed of all matters concerning the certification application with the exception of matters relating to the petition. The hearing then adjourned and the application was scheduled for continuation of hearing in Ottawa on April 21, 1980.

5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 5, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. As indicated above, there was filed with the Board prior to the terminal date a petition consisting of two pages signed by a number of employees in the bargaining unit. The number of signatures on the petition which correspond to signatures of persons in the bargaining unit who signed applications for membership in the applicant is sufficient that the Board, if satisfied on a balance of probabilities that the petition represents the voluntary wishes of those signing it, would exercise its discretion under section 7(2) to direct the taking of a representation vote.

7. The legal basis and effect of petitions and the Board's practice concerning same were explained in *Peacock Lumber Ltd.*, [1979] OLRB Rep. May 423 as follows:

"7. Neither 'statements of desire' nor 'petitions' are mentioned in The Labour Relations Act itself, but they do appear to be contemplated by Rule 48 of the Rules of Practice (R.R.O. 1970 Reg. 551 as amended.) The Board has a long established practice of accepting such petitions and exercising its discretion to order a representation vote where the petition is voluntary, complies with Rule 48, and contains the signatures of a sufficient number of persons who have previously signed membership cards, that there is some doubt

whether the union's 'members' continue to support its certification. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043 (at p. 1046) the Board explained the effect of a petition in the following way:

'16. Having regard to the statutory definition of 'member' and the provisions concerning membership evidence, the Board is satisfied that more than fifty-five per cent of the employees in bargaining unit #1 are 'members' of the union, and that therefore the union may be certified without a representation vote. However, section 7(2) of the Act gives the Board the discretion to order a representation vote where it considers it advisable to do so. The practice of the Board is to exercise this discretion in favour of ordering a representation vote where a sufficient number of the employees, who have been found to be union 'members', subsequently indicate that they no longer wish to support the union. When faced with this 'change of heart', the Board will order a representation vote in order to satisfy itself that, in addition to meeting the statutory membership support requirements, the union continues to enjoy the support of its members.

17. The 'change of heart' will often take the form of a petition or statement of desire indicating that the signatories no longer wish to support the union. There is no specific form required for such petition, but it must comply with the requirements of Rule 48, and clearly indicate the member's change of heart. Typically, the petition in opposition to the union is signed by members who have indicated their support only a few days before. Moreover, while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union. In these circumstances an employee may sign a petition out of fear that his refusal to do so will be made known to his employer rather than a genuine opposition to the union. It is for this reason that the Board undertakes the enquiry into the origination and circulation of the petition contemplated by Rule 48(5), in order to satisfy itself that the statement in opposition to the union is truly voluntary.

18. The statement of desire filed in opposition to the application bears a sufficient number of signatures which correspond to the signatures of persons in the full-time bargaining unit who signed membership cards that, if proven to be a voluntary expression, will cause the Board to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote...'

8. Rule 48 casts upon the petitioners an onus to call evidence as prescribed by 48(5), and to generally demonstrate that the petition is voluntary. The Board must be satisfied that when the members signed the petition, they were evidencing a genuine change of heart and were not motivated by a concern that their failure to sign would be communicated to the employer, or could result in reprisals. It must be clear that the circulation of a petition is

free from the actual, or perceived, influence of management. In this respect the Board takes the same approach as it does with union membership evidence. (See, for example, *Veres Wire*, [1976] OLRB Rep. July 337 where the involvement in a union organizing campaign of a person reasonably perceived to be managerial, prompted the Board to reject the union's membership evidence because it was not satisfied that 'members' had signed voluntarily.) In *Radio Shack*, *supra*, the Board commented:

'24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the 'sudden change of heart' by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

'In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influence, obvious or devious which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* [1975] OLRB Rep. Nov. 813 and the cases cited therein.)"

8. The petition in the present case was drafted by Philippe Collins, a shipper in the

bargaining unit who has been employed by the respondent for twenty-seven years. His wife, who is not an employee in the respondent, assisted him in drafting the following heading which she wrote on each of the two sheets filed with the Board:

“We all employees at D. Kemp Edwards Limited of 25 Bayswater Avenue of Ottawa. This is a petition. We don’t want any union.”

Collins testified that he obtained twenty-one of the thirty signatures (namely, numbers 1 to 5, 7 to 11 and 13 to 23, inclusive) on the petition between 7:00 and 7:30 a.m. on February 8, 1980 in the office of the Head Shipper, Bob Tompkins, on the premises of the respondent. He stated that he positioned himself at a counter in the office about five feet away from Tompkins’ desk and showed the petition to employees who came along the passageway behind the counter after they punched in. He asked these employees if they wanted a union or not and told them to sign the petition if they did not want a union. He stated that it is his normal practice to sit by his counter each morning at 6:50 a.m. to talk to the drivers until he commences work at 7:30 a.m. In response to questions by the Board, he stated that Tompkins arrived between 7:20 and 7:25 that morning. Collins also told the Board that Tompkins did not see the petition because when Tompkins arrived, he (Collins) put it back in his pocket. In cross-examination, Collins said: “I wasn’t worried that the Head Shipper might see the petition because I had nothing to hide. ...I wasn’t trying to sign it in such a way as to keep management from knowing about the petition. I would have asked Tompkins to sign it if I thought we needed his signature but we had enough signatures.”

9. Counsel for the petitioners also called as a witness Bernard Boudria, an employee in the respondent’s shipping yard. He identified his signature as number 12 on the petition and testified that he signed around 7:30 a.m. on February 8, 1980. He further testified that Tompkins was present when he signed and that Tompkins would have seen him sign the petition because Tompkins was at his desk only five or six feet away. Boudria also testified that Tompkins was close enough that he probably would have been able to overhear Collins tell Boudria and other employees: “If you don’t want the union, sign here”. He further stated that Tompkins “must have seen some of the other employees sign”.

10. It was not disputed that Tompkins is a member of management excluded from the bargaining unit. The evidence established that Tompkins has been an employee of the respondent for twenty years and was appointed to the position of Head Shipper only five or six months prior to the hearing. Before his promotion he had been the senior shipper in the yard. Since no new employees were hired to work in the yard after Tompkins became Head Shipper, all of the employees in the yard would have known Tompkins prior to his becoming Head Shipper. On the basis of these facts, counsel for the objectors submitted that it was unlikely that Tompkins would be associated with management by employees. The only evidence before the Board concerning the way in which Tompkins was viewed by employees was the testimony of Boudria who stated: “Mr. Tompkins is my foreman”. Michael Edwards, the President of the respondent, described Tompkins as “a supervisor” who is “not in the bargaining unit”. In the absence of other evidence concerning this matter, the Board is not prepared to draw the inference suggested by counsel.

11. Although Edwards testified that the area in which the petition was signed would be in a general state of confusion at 7:30 a.m. and that there could be ten or fifteen people in a rather small area, he was not present in the area at the time the petition was being signed

and, therefore, is not in a position to assist the Board in determining what actually occurred that morning. While the presence of Tompkins was innocent in the sense that he was merely at his normal work place at his normal time, we find that his presence under the circumstances created a situation in which management may have unintentionally influenced some of the employees who signed the petition. As noted in *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714; 77 CLLC ¶16,064, at para. 10, “[t]he Board has consistently refused to exercise its discretion and direct the taking of a representation vote where it feels that employees may have been influenced to sign a statement by the action of management even if that influence may have been unintentional.” (See also *Imperial Paving Company Limited*, [1966] OLRB Rep. July 253.)

12. In view of the contradictory evidence of the two persons who testified on behalf of the objectors concerning crucial factual matters in relation to the voluntariness of the signatures on the petition, the Board adopts and applies the following passage from *N. Weingarten*, [1969] OLRB Rep. Oct. 849, para. 5:

“There were two persons that testified on behalf of the group of employees and we find that their evidence was contradictory with respect to a number of facts concerning the circulation of the statement of desire. We are satisfied from the demeanour of the witnesses that neither fabricated testimony, but that they had either forgotten or were mistaken with respect to a part or parts of their evidence. It is therefore difficult to determine which part or parts of the evidence presented is reliable and accordingly we are not prepared to accept the evidence with respect to the statement of desire as casting doubt on the evidence of membership filed.”

Thus, the Board finds that the objectors have not proved on a balance of probabilities that the petition represents the volutary wishes of the employees who signed it. In view of this finding, it is unnecessary for the Board to deal with the other submissions made by counsel concerning the petition.

13. Accordingly, in the exercise of its discretion under section 7(2) of the Act, the Board declines to direct the taking of a vote. In the result, therefore, the Board repeats the finding in paragraph 5 hereof that it is satisfied, on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 5, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

15. The grievor, who had been a lathe and shaper operator in the employ of the respondent for three and one half years, was discharged by the respondent on February 12, 1980. As noted above, it is contended that this discharge was in violation of the Act.

16. The respondent has been a family owned and operated business for fifty-six years. Edwards testified that apart from the organizational campaign of the applicant which gave rise to the present application for certification, there has been no previous union organizational activity to the best of his knowledge.

17. The grievor testified that he first became interested in forming a union on July of 1979 at which time he and Rick Ferrier, another employee of the respondent, contacted the applicant. The first meeting with the applicant was held on August 23, 1979 and was attended by five employees of the respondent, including the grievor. At that meeting the grievor decided to join the applicant and thereafter began to attempt to sign other employees into the applicant.

18. Edwards testified that he first became aware of union organizational activities in late August when some union literature was distributed in the lunchroom. In response to this literature which included a notice of a union meeting to be held at 5:00 p.m. on August 30, 1979 at an Ottawa hotel, which notice was posted on the bulletin board in the employees' lunchroom, Edwards, with the approval of his lawyer, personally distributed to each employee the following pamphlet which he asked each of them to read:

“NOTICE TO EMPLOYEES IN THE FACTORY, MILL AND YARD

You are going to be asked to attend a meeting to know if you wish to join a union or not.

You will be asked to pay an amount to join the union and sign a union card so that you may have a collective bargaining unit to deal with management. If this is the wish of the majority of employees then management will have to accept this but if you would like the opportunity to deal with management directly there are some things to be considered.

The last year has not been a good one for the construction industry yet our firm has tried to maintain a competitive wage in light of economic circumstances. Our firm has yet to lay off any employees. As conditions improve, so naturally would the wages.

Under our present arrangement [sic] if dissatisfaction over wages exists the employee has the right and opportunity to go directly to management to discuss his grievance. Under a union agreement the employee pays monthly dues to be bound by a written agreement which will regulate the terms of employment.

In the past we have enjoyed a good employee – employer relationship with many benefits flowing to both sides.

The Management

D. KEMP EDWARDS LIMITED”

Edwards explained that he distributed this document to each employee individually because he felt it to be important that all employees should see it and because it was too late in the day to effect notice by posting it in the lunchroom as the employees would have no reason to return to the lunchroom after the afternoon break.

19. Approximately five employees, including the grievor, attended the union meeting

on August 30, 1979 to discuss grievances and methods of signing up additional members. After returning from a vacation, the grievor and Ferrier continued to attempt to sign more employees into the applicant. They also prepared and distributed to employees the following written response to the aforementioned notice distributed by Edwards:

“NOTICE TO EMPLOYEES IN THE FACTORY, MILL AND YARD

Please consider and protect your future at D. Kemp Edwards. Learn and understand the real difference between a union and a non-union shop and then use your own judgment on the basis of *real facts* to help decide your own future situation here. Let's consider them now.

Without a union, you will save \$12.00 a month union dues. Without a union you may deal directly with management as individuals, and strike up your own deal. Without a union you are not bound by any written or binding agreement signed by your union representative. While considering these facts please understand management's position. Running a company the size of D. Kemp Edwards is a responsible and difficult task. The management deserves our respect and understanding, as we deserve theirs.

There are unreasonable, overpowerful union organizations that would close your employer's doors in bankruptcy – if *you* let them. God forbid this should happen. We are not in favor of overpowerful union people any more than we are of an intimidating company management.

This United Brotherhood of Carpenters and Joiners of America AFL-CIO-CLC is your organization, represented by your elected employee representatives, picked by you from within your own group. Union management in this case acts only as a guiding hand in negotiations. All agreements must be accepted by your own local representative and ratified by a majority of the members.

The employees that are attempting to start a union at D. Kemp Edwards believe that with a little common sense, a good agreement for the employees and a fair and reasonable contract that management can live with, may be struck all in the same bargain. This union is not out to bankrupt the time-honored firm of D. Kemp Edwards. This would be to no one's benefit.

Please understand that as a group our bargaining power would be greatly increased. We should expect to achieve some basic fringe benefits like company paid O.H.I.P. premiums (a common practice in both union and non-union companies today). Also, we hope to achieve at least a reasonable wage increase in close pace with the inflation rate.

The law protects your rights to apply for union membership, and prevents an employer from discharging any employee because he has applied for union membership. The Labour Relations Act Sec #3 says 'Every person is free to join a trade union of his own choice and to participate in its lawful activities.' R.S.O. 1970, c. 232, s. 3.

Also, please note the law under section #56. 'No employer or employer's organization, and no person acting on behalf of an employer or an employer's organization, shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union, but nothing in this section shall be deemed to deprive an employer or his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.' R.S.C. 1970, c. 232, s. 56.

Please consider these facts and use your own good judgment to decide your future position at D. Kemp Edwards.

Thank you for reading this."

20. During the first half of November, 1979, an employee brought the document set forth in the previous paragraph to the attention of Edwards, who, after reading it, went into the plant and asked Wings: "Can I speak with you a minute, Tim?" They then walked together to the kitchen near the main office area. Edwards explained that he chose to meet with Wings, whom he knew to be "a leading supporter of the union", in the kitchen because his (Edwards') office consists of partitions which do not reach the ceiling. He stated that he could not speak with Wings in the plant because the noise level there makes it difficult to hear. Thus, he indicated that it has been his practice to meet with employees concerning confidential matters in the kitchen. At that meeting, Edwards placed the union document on the table and asked if the union activity was still continuing and how far it was going to proceed. Wings said that the union activities were continuing because there were changes in working conditions which had to be implemented. Wings then briefly explained the employee grievances concerning terms and conditions of employment. Edwards expressed a willingness to consider the grievances with a view to attempting to implement changes which would be beneficial to all concerned. Edwards then complimented Wings on his work efforts and told him that his wage rate was being increased by seventy-five cents per hour (from \$6.30 to \$7.05). Wings testified that he was the only employee who received a wage increase at that time and also stated: "I think I got the wage increase to keep me quiet in terms of the organization of the union. . . . It did keep me quiet for a while. I knew it would keep me quiet for a while." During cross-examination, Wings conceded that the respondent has a practice of giving merit increases throughout the year and that none of the other union organizers received an increase. Edwards testified that this increase was given to Wings to raise his rate from that of an assistant bench hand to that of a bench hand. He further testified that three other employees also received increases at that time, in accordance with a decision which Edwards had made a week earlier after discussions with the factory foreman, at a time when Edwards was not yet aware that Wings was a leading union organizer. Although Wings inferred that the increase was an attempt to buy him off, the Board is of the view that the evidence does not support such inference.

21. Wings testified that Edwards also said at that meeting: "If the union gets in, I'll close up doors." In his testimony, Edwards categorically denied making any such threat or statement about what he would do if a union came in and also stated: "When I went to see my lawyer in August, 1979, he advised me of union procedures, my rights and limitations as to what I could or could not say."

22. A week or two later, Winges went to Edwards' office of his own volition and made several suggestions concerning proposed changes in terms and conditions of employment. Edwards listened to the suggestions and told him that one of them (the sick leave proposal) could possibly be implemented at the time of the next general plant wage increase, which Edwards testified usually occurs in May. There was no discussion about unionization at that meeting.

23. Winges told the Board that the applicant's organizing campaign resumed in January of 1980. He called a union meeting at his home on January 19, 1980 by distributing circulars, maps and notices. It was at that meeting that the decision was made to apply for certification.

24. Edwards testified that the events which lead to the discharge of Winges occurred on February 11, 1980. Edwards returned to his office that evening between 7:15 and 7:30 and commenced to work at his desk from which he was able to see into part of the plant working area through glass partitions. Two employees, Rick Ferrier and Andre Beauchamp, had been authorized to work that evening on a particular order. Edwards stated that the respondent's policy is that no employee returns to the premises after hours except selected employees who have keys or employees who have been authorized to work on a particular night. One of the night watchmen employed by the respondent is on duty on the premises at all times from 5:00 o'clock in the evening to 8:00 in the morning. The watchmen are employed to provide fire protection, to safeguard the respondent's inventory and to stoke the boiler. For ten minutes of every hour they do a security round during which they punch various security clocks. The remaining fifty minutes of each hour are spent in the boiler room. Edwards testified that to enter the premises after hours, a person without a key would ring the door bell located near the top of the door frame on one of the front doors to the premises. This would cause a bell to ring in the boiler room to summon the watchman. The watchman is advised by management of the names of any employees who have been authorized to return to work on any particular evening.

25. While working at his desk on the evening of February 11, 1980, Edwards observed Winges "over in one corner of the plant, just standing there". He estimated that Winges was about twenty to twenty-five yards from where Ferrier and Beauchamp were working. Edwards then went downstairs to see who had punched in. When he found that Ferrier and Beauchamp had punched in but that Winges had not, Edwards went up to the factory. He met Armstrong, the night watchman on duty that evening, on the way but did not speak with him because Armstrong was two or three minutes into his rounds and was on his way to punch a clock in the central office. (Failure to punch a clock at the proper time triggers an alarm at the office of the security company to which the clock system is wired.) When Edwards reached the place in the plant where Winges was standing, he asked Winges what he was doing. Edwards' evidence was that Winges gave no answer at that time. Edwards then brought him to the general office area and asked him how he had gained access to the plant. Winges said that he had climbed over the fence. It was Edwards' testimony that Winges, when asked again to explain his presence, said that he had come to try to get Armstrong to sign into the union. Edwards testified that Winges gave no other reason for being on the premises. Edwards stated that he was aware at that time that Armstrong was excluded from the bargaining unit for which the applicant had applied to be certified. (It was not disputed that the exclusion of "security guards" was intended by all parties to exclude Armstrong and the other employees referred to by the witnesses as "night watchmen".) Edwards told

Winges “not to report for work the following day until further notice”. Being concerned to know over which fence Winges had climbed, Edwards went out into the yard and followed a set of footprints in the freshly fallen snow from the plant to a point along the fence at the back of the yard. Edwards subsequently spoke with Armstrong who told him that he had not seen Winges in the plant.

26. After speaking with his lawyer to clarify his position, Edwards prepared and sent by registered mail a letter of discharge to Winges on February 12, 1980 which read.

“This letter is to advise you that your employment is hereby terminated effective immediately. As your [sic] admitted to me last night you climbed over the fence to gain illegal entry to the yard and factory. You had neither permission nor authorization to be on the premises after hours.

Your cheques are enclosed for wages owing to 5 P.M. yesterday together with appropriate vacation pay. Application will be made for refund of pension contributions and a cheque will be forwarded when received.”

27. Edwards testified that he is always concerned about the security of the respondent’s inventory. Although he conceded that there has not been a recent rash of thefts of inventory by employees, he noted that the respondent has suffered such losses in the past. He stated that he was concerned about the breach of security at the plant by Winges, particularly in view of the implausible reason given by Winges for his presence, namely, an attempt to sign into union membership a person who is excluded from the bargaining unit for which the applicant sought bargaining rights, at a time when, according to Edwards’ understanding, all of the union cards had already been signed since the application had already been filed. In response to a question by counsel for the applicant, Edwards stated that he understood the terminal date to be the date by which he had to file lists of employees and specimen signatures. He was unaware that evidence of union membership could be submitted to the Board on or before the terminal date. Edwards also testified that he disbelieved the reason given by Winges because if Winges had wanted to see Armstrong, he could have rung the bell. Edwards suggested that the existence of the bell and its purpose are generally known by employees of the respondent.

28. Edwards conceded that Winges had a good attendance record and had never been suspended or otherwise disciplined to the best of his knowledge. Although he had never posted a written rule forbidding employees to return to the plant after closing, Edwards stated: “One has to assume that if you break and enter, severe action will be taken. . . . I didn’t feel that it was necessary to put up a notice not to break in.” He further stated that in the 1960’s, while his father was running the business, a number of employees were discharged for breaches of security. However, he indicated that since he took over the operation of the business in 1974, there has been no breach of security other than the Winges incident to the best of his knowledge. He testified that he discharged three or four other employees in the past year for cause, including intoxication and incompetence. When asked why he did not discharge Winges immediately on the evening of February 11th, Edwards said: “I didn’t discharge him on the spot because I knew he was involved in the union. I thought that I should get legal advice that night. I wasn’t sure whether I could discharge him or not. I had to assess the situation. I knew that I couldn’t change the working conditions. I wasn’t fully aware of the ramifications of what that means.

29. Wings testified that he went to the respondent's premises at 7:45 p.m. on February 11, 1980 "to sign up the night watchman and to meet with the boys (Ferrier and Beauchamp) afterwards". He stated that after standing outside the front gate for about twenty minutes hoping to see Armstrong, he walked around to the back of the respondent's property and with very little effort climbed over a ten foot fence which was covered almost completely with snow. He indicated that he did not know whether the night watchmen were included in the bargaining unit because he did not prepare the application for certification and only briefly read the Form 5 posted in the lunchroom. According to his testimony, after climbing over the fence he went to the boiler room to see if Armstrong was there. Failing to find him there, he entered the plant, saw Armstrong and, after introducing himself, spoke to Armstrong for approximately five minutes about their respective jobs. Wings evidence-in-chief concerning this matter was: "I didn't ask the watchman if he wanted to join the union. I was waiting till he let Rick (Ferrier) and Andre (Beauchamp) out the gate. I decided to wait until then because he was on his working hours. His working hours were finished at midnight. I understood that he was going to let Rick and Andre out at midnight. . . . I decided to wait until he let Rick and Beauchamp out to ask him because at that time I would have been off the premises. The union representatives told me not to sign people up on company property during working hours." Wings' evidence was that he returned to the door through which he had entered after he saw Edwards and stood there to wait until Edwards came up. According to his testimony, when Edwards asked him what he was doing there, he replied: "I'm here to go out with Rick and Andre after and to talk to Mr. Armstrong about joining up with the union." Wings asserted that Edwards was very angry and grabbed him by the coat to escort him to the front door. He also stated that before he left the building, he asked Edwards whether he was going to "close up shop" if the applicant was certified, to which Edwards allegedly responded: "Did I say that?" Wings further stated that he had only gone through the door with the bell once or twice since he commenced employment with the respondent and testified that he did not know on the evening of February 11, 1980 that the bell existed. He claimed that he was totally unaware of any company policy about returning after hours, although he conceded that it would be necessary for an employee to punch in if he returned to work in the evening.

30. The Board has concluded that Wings was not a credible witness, particularly in relation to the events of February 11, 1980. His testimony was marked by lengthy pauses between questions and answers. Moreover, he tended to exaggerate or distort facts. For example, while testifying-in-chief concerning his first meeting with Edwards, he stated: "At that meeting he slapped [the union document] down on the table and said: 'What does this mean? How far is this union bit going to go?'" However, under cross-examination he conceded that Edwards merely placed or tossed the document on the table and said in a non-threatening voice: "What do you know about this? How far is this thing going to go." He also testified-in-chief that no one else received a wage increase in November of 1979 but conceded in cross-examination that his only basis for this statement was that each of the other four organizers had advised him that they had not received any increase. Moreover, Wings was evasive and unresponsive in some areas while under cross-examination, particularly when he was cross-examined as to why he could not have spoken with Armstrong at some other time and location. A number of contradictory responses by Wings also cast serious doubt on his credibility. For example, he stated that Armstrong comes in at 5:15 p.m. but then under further cross-examination admitted this to be untrue. He stated that he only briefly read the Form 5 posted in the lunchroom but later conceded: "I probably saw that security guards were excluded from the bargaining unit described in Form 5." He testified that

his question to Edwards about whether the latter was still going to close the shop if the union came in was not included in the statement of particulars provided to the respondent by the applicant because it had “slipped [his] mind”, but he later changed this answer by saying that although he did tell someone about it, it “just didn’t find its way into the letter of particulars”. He asserted that Edwards “grabbed [him] on the right shoulder” in the plant on the evening of February 11, 1980, but conceded in cross-examination that Edwards had merely put his hand on his shoulder and guided him in a different direction from that in which he had been going. His evidence also contained serious inconsistencies. For example, he testified that he was not going to discuss the union with Armstrong while on company property, but also suggested that he was going to determine through talking to Armstrong whether he would be interested in the union. He testified that Armstrong would have to step off company property when he opened the gate to permit Ferrier and Beauchamp to exit, but then conceded that the gate opens inwards onto company property. Furthermore, Winges was unable to offer any explanation of his apparent belief that it would be permissible to sign up a watchman while the watchman was on duty if the watchman stepped off company property momentarily in the course of his duties. The grievor also failed to provide a satisfactory answer to the question of why he was attempting to sign only one of the security guards into the applicant and not the others.

31. Edwards, on the other hand, testified in a candid and forthright albeit somewhat nervous manner and his testimony was not in any way shaken under rigorous cross-examination. Accordingly, having regard to the demeanour of these witnesses and the matters set forth in the previous paragraph of this decision, where the evidence given by Winges and Edwards conflicts, the Board accepts the testimony of Edwards and rejects the testimony of Winges. In particular, we share Edwards’ disbelief that Winges entered the premises of the respondent on the evening of February 11, 1980 to attempt to persuade Armstrong to sign an application for membership in the applicant. Although Edwards was admittedly aware at the time of Winges’ discharge that he was a leading union organizer, it is not insignificant that Edwards had been aware of that fact for approximately three months prior to the discharge. Generally, an employer who desires to chill unionization by discharging a union leader, takes such action early in the organization campaign, not five days after the Notice of Application for Certification has been received by the Board at a time when most, if not all, of the membership evidence will already have been gathered. Moreover, Winges testified that Ferrier was “a leading supporter of the union” who was “even more involved (than Winges) in signing up members”. However, there is no allegation or evidence that any adverse action whatsoever was taken by the respondent against Ferrier or any other union supporter.

32. On the basis of all the evidence, the Board finds that the respondent has satisfied the burden of proof placed upon it by section 79(4a) to establish on the balance of probabilities that the reasons given for the discharge are the only reasons and that these reasons are not tainted by any anti-union motivation (see *Barrie Examiner* D71975 OLRB Rep. Oct. 745; and *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299). We conclude that Winges’ union activities played neither a major nor a minor role in the respondent’s decision to discharge him (see *Fielding Lumber*, [1975] OLRB Rep. Sept. 665).

33. Even if the reason advanced by Winges were the true reason for his entry onto the premises of the respondent on the evening of February 11, 1980, such conduct is not protected by *The Labour Relations Act*. Section 62 of the Act provides:

“Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.”

Section 10 empowers the Board to direct an employer to grant a trade union representative access to the property of the employer for the purpose of attempting to persuade employees to join a trade union, but this provision only applies where employees of the employer reside on the property of the employer or on property to which the employer has the right to control access. Thus, even if the reason given by Wings to explain his presence on the respondent's premises were true, the Board would not find his discharge to be in violation of the Act unless, of course, the respondent failed to prove on the balance of probabilities that the true reason for the discharge was the grievor's unauthorized presence on the premises of the respondent and that the discharge was not in any motivated by the grievor's activities in support of the union prior to that evening. As indicated above, the Board finds that the respondent has met this burden of proof in the instant case.

34. Accordingly, the section 79 complaint is dismissed.

1669-79-M Ontario Provincial Conference of Bricklayers Local No. 12
Kitchener, Ontario, Applicant, v. **Lavern Asmussen Ltd.**, Respondent.

Abandonment – Section 112a – General contractor sub-contracting work in accordance with agreement – No direct contact with union for six years – Bargaining carried on through employer organization – No abandonment

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members M. J. Fenwick and F. W. Murray.

APPEARANCES: *D. Demonte for the applicant; R. M. Parry and George Percival for the respondent.*

DECISION OF THE BOARD; May 6, 1980

1. This is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*. The grievance alleges that the respondent has improperly sub-contracted certain plastering and stucco work.

2. The applicant contends that the respondent is bound to the terms of a provincial collective agreement dated May 1, 1978 between The International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of The International Union of Bricklayers and Allied Craftsmen (“the Provincial Conference”) on the one hand, and the Masonry Industry Employers Council of Ontario (“MEICO”) on the other hand. The respondent concedes that the applicant at one time held bargaining rights for its employees, but contends that those bargaining rights have been abandoned and are now non-existent.

3. At the hearing in this matter the Board ruled orally that the applicant had not abandoned its bargaining rights, and that the respondent was bound by the terms of the provincial collective agreement. The reasons for this ruling are set out below.

4. On September 18, 1967 the respondent entered into a collective agreement with Local 12 of The Bricklayers', Masons' and Plasterers' International Union ("Local 12") covering a bargaining unit of bricklayers, stonemasons and plasterers. It should be noted that the name of the International Union was subsequently changed to The International Union of Bricklayers and Allied Craftsmen.

5. On April 7, 1971 the respondent issued a proxy to a committee comprised of the representatives of a number of masonry firms permitting it to bargain on the respondent's behalf with Local 12. Subsequent negotiations resulted in a collective agreement with Local 12, which the respondent executed, running from May 1, 1971 to April 30, 1972.

6. On February 17, 1972 the Ontario Federation of Construction Associations (OFCA) Trade Bargaining Council for Bricklayers forwarded to the Provincial Conference a list of masonry contractors for which it held bargaining rights. Included on the list was the name of the respondent. On May 2, 1972 the Provincial Conference and OFCA entered into a collective agreement which expired on April 30, 1973. An appendix to the agreement listed the respondent as being bound by the agreement within the territorial jurisdiction of Local 12. At about this time MIECO came into existence as a successor to the OFCA Trade Bargaining Council for Bricklayers. From 1973 to 1978 the Provincial Conference and MIECO were signatories to a series of collective agreements which stated that they were binding on the respondent. At no point did the respondent advise the Provincial Conference or MIECO that it no longer desired to have MIECO bargain on its behalf.

7. On May 1, 1978, after the advent of province-wide bargaining, MIECO and the Provincial Conference entered into the provincial agreement being grieved under. An appendix to the document listing the names of employers stated to be bound by the agreement includes the name of the respondent.

8. The respondent operates as a general contractor in the industrial, commercial and institutional sector of the construction industry. Mr. G. Percival, the respondent's president, testified that the respondent last employed a bricklayer some five or six years ago. At that time the respondent made the appropriate filings and payments to the Provincial Conference. Since that time the respondent has not directly employed any bricklayers but has instead contracted out all of its masonry work to unionized contractors. This would have been in compliance with the sub-contracting provisions of the provincial collective agreement and its predecessors. The respondent also had a small amount of stucco work, along with a larger amount of drywall and acoustic tile work, performed by non-union carpenters. Stucco work is included in the jurisdictional claim for plasterers in the provincial agreement and its predecessors. No evidence was led, however, to show that the applicant knew, or should have known, about the small amount of stucco work let in this manner. In addition, no evidence was led as to any non-stucco plastering work having either been performed or contracted out by the respondent.

9. The respondent has let out resilient floor work to certain non-union contractors. Locals belonging to the Provincial Conference represent a number of resilient floor layers,

but under a separate collective agreement from that being grieved under. Further, on the evidence it appears that neither Local 12 nor the Provincial Conference ever acquired bargaining rights for resilient floor layers employed by the respondent.

10. The respondent's claim that the applicant has abandoned its bargaining rights rests on the undisputed fact that five or six years had passed between the last direct contact between the applicant and the respondent and the filing of the grievance giving rise to these proceedings.

11. For the Board to conclude that a union has abandoned its bargaining rights, it must be satisfied that the union has voluntarily given up those rights. In certain circumstances inaction on the part of the union over an extended period of time may indicate that such an abandonment has occurred. Such a conclusion, however, cannot be drawn from the facts of this case. The respondent has not directly employed any bricklayers for some five to six years. Further, the respondent sub-let all of its masonry work to unionized masonry firms in accordance with the terms of the applicable collective agreement. Because of this there was no reason for representatives of the applicant to deal directly with the respondent or to file grievances against the respondent with respect to its bricklaying work. The performance of stucco work by non-union carpenters along with drywall and acoustic tile work appears to have involved such a small amount of stucco work that it could easily have been missed by the applicant. In addition to this, year after year MIECO, and before it the OFCA Trade Bargaining Council for Bricklayers, sat down at the bargaining table and not only purported to bargain on behalf of the respondent, but also to sign collective agreements stating that they were binding on the respondent. Given the nature of the respondent's operation, there was in fact not much more that the union could reasonably have done in the exercise of its bargaining rights. Taking all of these facts into account, the Board is not satisfied that the applicant ever voluntarily abandoned or gave up its bargaining rights. Having regard to this conclusion, and to the provisions of sections 125 and following of the Act, we are satisfied that the respondent is bound to the Provincial collective agreement being grieved under.

12. At the hearing the parties indicated that they felt they could reach agreement on all other outstanding matters relevant to this referral. If such an agreement cannot be reached, the applicant should so notify the Registrar and the matter will be re-listed for hearing.

1482-78-U Antonio Valente, Complainant, v. Local 247 of the Labourers' International Union of North America, Respondent.

Duty of Fair Representation – Practice and Procedure – Referral to employment under section 60a pursuant to collective agreement – Whether section 70 extends the duty under section 60a after expiry of agreement – Delay in filing complaint – Whether Board barring complainant from proceeding

BEFORE: Rory F. Egan, Vice-Chairman.

APPEARANCES: *Moir Bartram for the applicant; B. Fishbein and M. Sullivan for the respondent.*

DECISION OF THE BOARD; May 6, 1980

1. This is a complaint under section 79 of *The Labour Relations Act* in which the complainant alleges that he has been dealt with by the respondent contrary to the provisions of section 60a of the Act.

2. Section 60a reads as follows:

“Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.”

The respondent made two preliminary motions and the Board heard the submissions of the parties with respect thereto.

3. The respondent moved for dismissal of the allegations in the complaint with respect to the period of time when its collective agreement was not in effect and had not been replaced by a provincial collective agreement. The motion has its basis in the opening words of section 60a quoted above.

4. In *Local 247 of the Labourers' International Union of North America*, [1979] OLRB Rep. July 675, the respondent, which is the same respondent in the instant case, brought a similar motion. In that case the Board stated in paragraph 9:

“The Board finds that effect must be given to the words ‘pursuant to a collective agreement’ as meaning a collective agreement current at the time the incident occurred. That being the case, it is incumbent upon the applicant under section 60a to prove the existence of a collective agreement applicable to the situation and containing provisions governing the selection, referral, assignment, designation or scheduling of persons to employment in order to sustain allegations of a breach of section 60a.”

5. In the above-cited case the Board reserved its decision on the question raised by the motion and heard all the evidence concerning the incidents alleged by the respondent.

The Board then found that even if it were to be assumed that all the evidence is admissible, the complainant had not established a case under section 60a. The Board consequently was not required to decide the question as to whether a collective agreement 'current at the time the incidents arose' was actually present or not.

6. The Board has also considered the submissions of the parties herein on the question as to whether a collective agreement was in force during the period covered by the allegations and particulars relied upon by the complainant.

7. The evidence shows that there had been a collective agreement in force binding upon the respondent union and the Kingston Construction Association which was effective from May 1, 1977 to April 30, 1978, and from year to year thereafter subject to notice. The agreement contained provisions dealing with the hiring of employees through the union office.

8. Notice to bargain was given and negotiations finally resulted in the issuance of a "No Board" report by the Minister.

9. It was the contention of the respondent that the legislation governing province-wide bargaining which came into effect on April 30, 1978, affected the relationship between the parties and therefore put an end to the collective agreement in any event.

10. Section 132(2) of the Act provides:

"Notwithstanding subsection 1 of section 44, every collective agreement in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106 and represented by affiliated bargaining agents entered into after the 1st day of January, 1977 and before the 30th day of April, 1978 shall be deemed to expire not later than the 30th day of April, 1978, regardless of any provision respecting its term of operation or its renewal."

11. The complainant argued that by the use of the words "deemed to expire" in section 132, the Legislature was contemplating the possibility of the provincial agreement not being completed by April 30, 1978. It was observed by counsel for the complainant that the legislation contains no specific provision dealing with any period of time during which, after April 30th, there would be no agreement in force and no provincial agreement had been concluded. The submission was that the Legislature would not intend to leave a hiatus between April 30th and whatever date the province-wide agreement might be signed in which the union, in this instance, could do as it pleased while a member could not know if its actions were in accordance with the union conduct to which he had been accustomed under the collective agreement. It was submitted that in the absence of a collective agreement, there is a duty on the union to honour the terms of the old agreement and the Board should require the union to honour the intent of the old agreement until the coming into effect of the province-wide agreement.

12. It is clear from the legislation [section 132 (1)] that except for collective agreements which were in operation at the time the sections came into force, every agreement en-

tered into after January 1, 1977 and before April 30, 1978 shall be deemed to expire not later than April 30, 1978 "regardless of any provision respecting its term of operation or its renewal". The word "deemed" in this instance has finality and its use is made necessary only for the reason that most agreements contain provisions with respect to continued operation or renewal in the event of failure of a party to give notice of intent to bargain. The notion of finality is emphasized in section 133(2) which provides that there shall be no bargaining for or attempting to bargain for nor no concluding of a collective agreement or any other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement and that any other agreement shall be null and void. Subsection (3) of section 133 again marks April 30, 1978 as the commencement date for the new agreements and, consequently, the expiry of the old.

13. It is, of course, obvious that the legislation contains no provisions directly governing the rights of the parties in the event of the failure (as happened here) to conclude a province-wide agreement at or before the expiry date of April 30th. Whatever the reason for that may be, it does not lie within the power of the Board to remedy the situation, as suggested by the complainant, particularly in view of the unmistakable intent of the legislation to bring to an end at April 30th all agreements save those noted above.

14. During the hearing, however, the question was raised as to whether section 70(1) could be said to apply to the instant situation. Section 70(1) is as follows:

"Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first."

15. The submission of the union was that section 70(1) did not have any application in a section 60a case since it obviously did not keep a collective agreement in force, whereas

section 60a only applied where an agreement was in operation at the time of the alleged offence. The fact that section 70 makes specific provision for arbitration, it was argued, fortifies the view that section 70 does not preserve the collective agreement.

16. In view of the manner in which the *Menacho* case (*Local 247 of the Laborers' International* case cited above) was decided, it was unnecessary to pursue the question as to the application of section 70 to a section 60a case. The matter is, however, relevant to the present situation.

17. Section 70 is clearly designed to deal with the situation where, after notice, no collective agreement is in operation. That was the situation in the present case following April 30, 1978. In the absence of language in the sections governing province-wide bargaining dealing with the question of an hiatus, it must be presumed that the Legislature was aware of the presence of section 70 in the Act and were content to let it govern the situation to the extent of its terms.

18. There can be no doubt that the hiring-hall arrangements which obtained under the collective agreement which expired on April 30th fall within the meaning of "any other term or condition of employment" as these terms are used in section 70(1). The unilateral alteration which would include the suspension of these terms is prohibited by section 70(1) until the expiry of the time limits set out in that section. There is nothing in section 70(1) which exempts hiring-hall arrangements from its scope, nor do the words "pursuant to a collective agreement" appearing in section 60a prevent the application of section 70(1). The matter was not dealt with in the *Menacho* case as already noted, and while that decision refers to a collective agreement "current at the time the incidents occurred", that phraseology does not override, in a section 60a situation, the applicability of the provisions of section 70 within the time limits set out therein. It follows, therefore, that the hiring-hall system as it had operated under the collective agreement is preserved by section 70(1) for fourteen days following the release of the "No Board" report and any alleged breach of the system during that time is properly before the Board, whereas any following the expiry of the time limits are excluded.

19. A further objection was taken by the union to the hearing of evidence with respect to allegations of breaches of section 60a occurring as far back as 1975 and 1976 when the application was not made until November 27, 1978.

20. With respect to the question of delay as related to complaints brought under section 79, the Board said in *CCH Canadian Limited*, [1977] OLRB Rep. June 351:

"The Board as a general rule will not refuse to entertain a complaint under section 79 only because of a delay in lodging the complaint. Where unreasonable delay has occurred, the Board in most cases will simply take this factor into account in assessing any compensation which might be awarded. In the instant case, however, we are of the view that because of the extreme delay in the filing of the complaint and, in the circumstances, the lack of any mitigating factors which might justify or excuse such a delay, the Board should exercise its discretion under section 79 of the Act and refrain from inquiring into the complaint."

Similarly in the *Concrete Construction Supplies* case, [1979] OLRB Rep. Aug. 739, the Board stated:

“It is not the practice of the Board to bar complaints under section 79 unless there has been extreme delay. In the case of complaints involving alleged violations of section 60, the Board’s practice has usually been to hear the complaint and consider delay, if it is unreasonable, when considering the relief to be given.”

See also *The Ontario Paper Company Limited*, [1980] OLRB Rep. Jan. 76.

21. In view of the fact that the complaints in the present case are alleged to be related to a course of conduct that is said to have been exercised against the complainant despite his protests, and having in mind the views of the Board in the cases set out above, the Board proposes to hear the evidence with respect to all the allegations except those excluded under the ruling of the Board set out above.

22. The matter is referred to the Registrar for listing for continuation of hearing in accordance with the foregoing.

2342-79-U International Woodworkers of America, Complainant, v. G. W. Martin Lumber Limited, Respondent.

Interference in the Trade Union – Collective agreement permitting revocation of membership and dues check-off authorization – Foreman soliciting revocations – Whether contrary to section 56

BEFORE: R. D. Howe, Vice-Chairman and Board Members B. Armstrong and E. C. Went.

APPEARANCES: *James Hayes, R. Navarretta and T. Sweet for the complainant; S. A. Bjarnason for the respondent.*

DECISION OF THE BOARD; May 29, 1980

1. This is a complaint filed under section 79 of *The Labour Relations Act* in respect of alleged violations of sections 3, 56, 58 and 61 of the Act.

2. The respondent operates at seven separate locations in Ontario. The applicant has bargaining rights for employees at five of these locations and has entered into a series of collective agreements with the respondent. This complaint arises out of the alleged misconduct of a foreman at the respondent’s sawmill and wood chip facility in the Township of Harcourt.

3. The collective agreement dated May 16, 1978 between the parties contains the following provisions:

“

SCOPE AND RECOGNITION

- 2.01 The Company recognizes the International Woodworkers of America, Local 2-1000, as the sole collective bargaining agency for all employees of the Company in the Township of Harcourt, save and except foremen, persons above the rank of foreman, piece workers self-financing contractors and contractors, broker truckers, office and sales staff, two (2) lead log scalers, two (2) lead lumber scalers, and students employed during the school vacation period.

UNION SECURITY

- 4.01 All employees of the Company who at present are members of the Union shall remain members of the Union as a condition of employment, and will pay the regular monthly Union dues as set forth herein.
- 4.02 The Company agrees to deduct from all employees who have been hired by the Company after the signing of this Agreement and who have completed their probationary period, an amount equal to the current Union dues, as a condition of continued employment.
- 4.03 The Company will check off the regular monthly dues, initiation and other assessments authorized by the Union on the first day of each month. Such amounts will be remitted to the Secretary-Treasurer of the Union prior to the end of the month in which they were deducted, together with a list of employees from whom they were made and a copy of such list shall also be sent to the Chairman of the plant.
- 4.04 An employee shall have the right to revoke the above assignment of wages and membership in the Union during thirty (30) day period immediately preceding the expiration date of this Agreement. The notice to revoke such wage assignment and membership in the Union shall be given in writing to the Company with a copy for the Union.

DURATION OF AGREEMENT

- 27.01 The parties hereto agree that this Agreement shall be effective March 5th, 1978 until March 4th, 1980, and thereafter from year to year unless at least sixty (60) days' written notice of contrary intention is given by either party to the other party. The notice required hereunder shall be valid and sufficiently served, given or made at least sixty (60) days prior to the expiry date of any yearly period. Such notice required hereunder shall be given prepaid registered mail.”

4. The complainant alleges that between February 5, 1980 and March 4, 1980, David Anderson, a foreman of the respondent at its Harcourt operation, approached employees and asked if they wanted to sign a document revoking their membership in the complainant and that, as a result of these approaches, thirty-one employees submitted revocation.

5. David Anderson is the foreman responsible for the lumber yard, dry kiln, and planer at the respondent's Harcourt operation. Kenneth Vaughan, a lift truck operator in the lumber yard, testified that about a week before the collective agreement expired on March 4, 1980, Anderson approached him and asked him if he would like to leave the complainant. Vaughan also testified that Anderson told him that he would probably be the only lift truck operator in the lumber yard left in the complainant if he did not sign out. Although Vaughan did not submit a revocation, he testified that he "figured that Anderson was trying to break the union". However, he also agreed in cross-examination that Anderson was a "fair man".

6. Leo Scott, another employee supervised by Anderson, testified that Anderson asked him in February in the presence of other employees if he wanted to sign out of the complainant and told him that the respondent would protect him if he wanted to do so. Scott did not submit a revocation. In cross-examination, he agreed that Anderson is a "fair minded man".

7. One of the other employees who was approached by Anderson at the same time as Scott was Joseph Green, a labourer in the lumber yard. Green gave the following testimony: "Dave [Anderson] came in and asked me and a few other guys if we wanted to be out of the union. He said we'd be covered and everything in the same way as if we were in. I said I would drop out. I dropped out a week or so later ..." Under cross-examination, Green agreed that Anderson is a "fair foreman" and gave the following reason for submitting a revocation: "What's the sense of paying twelve dollars per month [as union dues] if you get the same protection without it?".

8. Terry Sweet, the Chairman of the complainant's Harcourt bargaining unit, testified that he received thirty-one revocations, at least fourteen of which were from employees supervised by Anderson. When asked what effect the revocations had on the complainant, he testified: "This has made things a little more difficult for us to function. Whatever position we had, it has weakened us." He testified that during the previous set of negotiations in March of 1978, the respondent posted a notice in the lunchroom concerning the revocation clause and that two or three employees submitted revocations.

9. The respondent called six employees in the bargaining unit and two members of management as witnesses. Of the six employees, four (William Mitchell, Gary Burroughs, Richard Semple and Martin Smaglinski) worked in areas not supervised by Anderson and testified that they had never had any discussion with Anderson concerning revocations. Larry Donaldson, another member of the bargaining unit, testified that he went to Anderson and asked him how to go about signing out of the union. In response to this inquiry, Anderson told Donaldson how to word the revocation. Donaldson later typed his revocation on his typewriter at home and submitted it to Anderson. When asked why he had approached Anderson concerning this matter, Donaldson stated: "I don't know why I'd go to Dave Anderson. He used to be a member of the union. I figured he'd have knowledge about it." Floyd Minne, the sixth bargaining unit employee called as a witness by the respondent,

testified that although he was present when Anderson spoke to Scott and some other employees, he was unable to recall what Anderson said. When confronted in cross-examination with a document bearing his signature, purporting "to certify that Dave Anderson approached [Minnie] on company time to sign out of the union", Minnie testified that the signed statement was false. When asked why he had not told anyone prior to the hearing that the statement was false, he explained that it was signed at the urging of Leo Scott at a barn dance while Minnie was "so intoxicated that [he] did not know what [he] was doing and did not know whether [he] had signed it or not". Scott was not questioned concerning the circumstances under which this document was signed. By reason of the inability of Minnie to recall the events in question, the Board places no reliance on his testimony whatsoever.

10. The evidence clearly established that employees other than those who hold positions with the complainant are generally unfamiliar with the contents of the collective agreement; the decision of the respondent to discontinue its previous practice of sharing the cost of printing copies of the collective agreement for distribution to employees has apparently contributed to this dearth of information.

11. Anderson testified that he approached Scott, Minnie and three other employees who work under his supervision on February 29, 1980 and "told them that up until the fourth of March they could revoke their membership and dues by giving a signed copy to the company and the union." When asked to explain why he had done this, he said: "I did it because during the whole week I had guys coming up to me to ask how they could revoke their membership". He confirmed that he approached Vaughan "the same time as the others on February 29" but denied that he told Vaughan that he would be the only lift truck driver left in the complainant if he did not sign out. He further testified that he arranged for the office to prepare revocations for those employees who asked him to do so. During cross-examination, Anderson estimated that he spoke about revocations to all but twelve of the forty to forty-five employees in his areas in late February. He also indicated that he is one of the three members of the respondent's bargaining committee along with Grenville Martin who is the President and owner of the respondent. He testified that he could not recall discussing the revocations with Martin or any other member of management except Theresa Riley, the Personnel Manager to whom the revocations were delivered. Anderson also denied that he had told any employees that the respondent would protect them if they signed revocations.

12. Grenville Martin testified that the respondent had enjoyed a good relationship with the complainant for twenty-two years. He indicated that he did not know anything about Anderson's role in the matter until the day of the hearing but stated: "Administering the collective agreement is left to the Personnel Manager and the foremen. I live with the kinds of decisions which they make." He also testified that upon being informed by the Personnel Manager about the number of revocations, he phoned the President of the complainant three or four days prior to the first negotiation session to tell him about it because he was "afraid that it might be a complete collapse of the union". The reason given by Martin for his concern was: "We need stewards. We need people to handle the grievances." When asked in cross-examination if he thought that the revocations would weaken the complainant's position at the bargaining table, he stated: "The strength of the union does not enter into the picture at all during negotiations."

13. Counsel for the complainant submitted that regardless of motive, the uncontradicted evidence that Anderson approached certain employees on his own initiative to solicit

revocations and prepared revocations for employees constituted evidence of a *per se* unfair labour practice falling squarely within the ambit of section 56. He also contended that it was impossible to believe that the respondent would not be aware of the impact which revocations would have on the complainant's bargaining position. He analogized the situation to employer support of an anti-union petition in a certification or termination application.

14. Counsel for the respondent, on the other hand, contended that the essential ingredient of a violation of section 56 is the use of coercion, intimidation, threats, promises or undue influence and that Anderson was merely advising the employees of their rights as he was entitled to do under the freedom of expression granted to employers by section 56. He also argued that the respondent did not stand to gain anything by this activity because the complainant remains the bargaining agent regardless of the revocations and that Anderson's involvement in the preparation of the revocations did not "taint" these documents.

15. In resolving the conflict in the evidence between the testimony of Vaughan and Anderson it is more reasonable to believe that Anderson forgot than he had told Vaughan that he would probably be the only fork lift operator left in the complainant that to impute falsehood to Vaughan's testimony. (See Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974)). Also, in resolving the conflict between the testimony of Scott and Anderson, we note that Green's testimony substantially corroborates that of Scott in relation to the "protection" to be provided by the respondent to persons who signed revocations. While Anderson may not have used the word "protection", we find that he did assure employees present at that time that they would suffer no adverse effects if they signed revocations.

16. Section 56 requires the Board to maintain a delicate balance between the right of a trade union to be free of unlawful employer interference with its administration and the right of an employer to freely express his views. Section 56 seeks to protect the right of employees to select a trade union without interference by their employer. It also seeks to protect from employer interference the administration of a trade union and the representation of employees by a trade union. The Board has long recognized the "responsive nature" of the relationship between an employee and his employer and the "natural desire [of an employee] to want to appear to identify himself with the interests and wishes of his employer" (see *Piggot Motors (1961) Ltd.* (1962), 63 CLLC ¶16,246). Where there is evidence of employer interference, the Board in accordance with its legislative mandate has consistently refused to certify a union which employees may have joined as a result of such employer influence (see, for example, *Coons Heating & Sheet Metal Limited*, [1978] OLRB Rep. June 525) and has consistently refused to give any weight in certification proceedings and termination proceedings to petitions or statements of desire which employees may have signed as a result of such influence.

17. Interference with a trade union by a foreman is treated as interference with the trade union by the employer unless it is proved that the employees concerned knew or ought to be deemed to have known that the actions of the foreman were done by him not in support of but contrary to the interests of the employer (see *Metal Textile of Canada*, [1971] OLRB Rep. Nov. 694, paragraph 9; and *Veres Wire Industry Ltd.*, [1976 OLRB Rep. July 337, paragraph 2). In the present case, there is no evidence which would bring the situation within this exception.

18. Although it is not possible to provide a definitive statement of all of the types of activity which will constitute a breach of section 56, the Board finds that Anderson, a person acting on behalf of the respondent, interfered with the administration of the complainant by using promises (of protection or no adverse effects) or undue influence to obtain a revocation by Joseph Green of checkoff of dues of the complainant and membership in the complainant. Anderson's statement to Vaughan that the latter would probably be the only lift truck operator left in the union if he did not sign out also constituted use of undue influence by Anderson. Thus, we find that a violation of section 56 has been established.

19. Coercion, intimidation, threats, promises or undue influence are not essential elements of every violation of section 56. Mere interference by an employer or person acting on behalf of an employer with the administration of a trade union or with the representation of employees by a trade union is sufficient to constitute a breach of section 56 (see *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714; 77 CLLC ¶16,064), particularly where the conduct of the employer affects the internal affairs of a trade union to such an extent as to threaten the existence of the trade union as a viable bargaining agent (see *A.N. Shaw Restoration Ltd.*, [1976] OLRB Rep. Sept. 504). Anti-union animus on the part of an employer is not essential to a finding of illegality under section 56; the legality of employer conduct under this section depends upon the consequences flowing from the conduct rather than the underlying motive (see *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751, paragraphs 30 and 31). Therefore, the Board finds that Anderson also interfered with the administration of the complainant contrary to section 56 by initiating discussion with employees of the respondent concerning revocation of checkoff of dues of the complainant and membership in the complainant. While it may be permissible for a person acting on behalf of an employer to reply to an inquiry by an employee as to whether the latter has a right of revocation by referring him to the relevant provision in the collective agreement or to prepare a revocation form on the initiative of and at the request of an employee, it is a violation of section 56 for a person acting on behalf of an employer to initiate discussion with an employee concerning revocation of checkoff of trade union dues or revocation of trade union membership. Similarly, it is a violation of section 56 for a person acting on behalf of an employer to prepare, on his own initiative or on the initiative of the employer, such revocation for signing by an employee. As provided in section 3 of the Act, every person is free to join a trade union of his own choice and to participate in its lawful activities. The choice of joining or resigning from a trade union is a personal choice to be made by each employee on his own initiative. The initiation of discussion by a foreman or other person acting on behalf of an employer with employees about revocation of trade union dues checkoff or trade union membership, particularly at a time when the trade union is about to engage in collective bargaining with the employer, is very likely to undermine the trade union's bargaining position and could threaten the very existence of the trade union as a bargaining agent. Consequently, such conduct is prohibited by the Act.

20. The relief requested in the complaint included a cease and desist order, an order nullifying or revoking the revocations, and an order requiring the respondent to compensate the complainant for all monies lost as a result of the respondent's unlawful activities. At the hearing, counsel for the complainant conceded that it would be "heavy handed" for the Board to purport to nullify or revoke the revocations and, accordingly, withdrew the request for this remedy, but added a request for an order that the respondent post a notice prepared by the Board concerning the Board's disposition of this case and an order that the respondent convene a meeting of all employees concerning same. Counsel for the

complainant emphasized the need for a “make whole” order to restore the complainant to its previous position.

21. The evidence falls far short of establishing that all of the employees who signed revocations did so as a result of Anderson’s words or actions. As contended by counsel for the respondent, many of the revocations were submitted by employees who worked in areas outside of Anderson’s area of supervision or by employees who did not have any discussion with Anderson concerning their revocations. Nor does the evidence satisfy us that Anderson’s words or conduct served as a catalyst which gave rise to all or most of the other revocations. In fact, many of the revocations are dated prior to February 29, 1980, the date on which Anderson approached seven employees on his own initiative, of whom only one submitted a revocation. On the evidence before this Board, only the revocation by Joseph Green has been proved to have been at least partially occasioned by the words or conduct of Anderson. Thus, this is not an appropriate case for a “make whole” order; compensation must be limited to a sum equal to the dues which would have been received by the complainant from Joseph Green (for the period from the effective date of Joseph Green’s revocation to the date of this decision) if Joseph Green had not signed the said revocation. Nevertheless, the complainant is entitled in the circumstances of this case to the following relief pursuant to section 79 of the Act:

ORDER OF THE BOARD

- (a) The Board declares that the respondent, through foreman David Anderson, violated section 56 of *The Labour Relations Act* by using promises and undue influence concerning revocation of checkoff of dues of the complainant and membership in the complainant, and by initiating discussions with employees of the respondent concerning revocation of checkoff of dues of the complainant and revocation of membership in the complainant.
- (b) The respondent and all persons acting on behalf of the respondent are directed to cease and desist from using promises or undue influence concerning revocation of checkoff of dues of the complainant or revocation of membership in the complainant, and are further directed to cease and desist from initiating discussion with any employee of the respondent concerning revocation of checkoff of dues of the complainant or revocation of membership in the complainant.
- (c) The respondent is directed to pay to the complainant a sum equal to the dues which would have been received by the complainant from Joseph Green (for the period from the effective date of Joseph Green’s revocation to the date of this decision) if Joseph Green had not signed said revocation, together with interest on this sum to be calculated in the manner described in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35.
- (d) The respondent is directed to post copies of the attached notice marked “Appendix”, after being duly signed by a representative of the respondent, in conspicuous places in the respondent’s lumber yard, dry kiln and planer at its Harcourt operation, where they are likely to come to

the attention of the employees, and to keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced, or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

- (e) Notwithstanding the provisions of any collective agreement, the respondent, at the written request of any employee in the bargaining unit at Harcourt for which the complainant holds bargaining rights, shall deduct from the wages of the employee the amount of regular dues of the complainant payable by members of the complainant and remit said amount to the complainant forthwith.

0186-79-R Christian Labour Association of Canada, Applicant, v. **Master Insulation Company Limited**, Respondent, v. **International Association of Heat and Frost Insulators and Asbestos Workers, Local 95**, Intervener.

Construction Industry – Representation vote – Eligibility to vote – Insulation mechanics hired – Not performing bargaining unit work – Not entitled to vote

BEFORE: R. A. Furness, Vice-Chairman, and Board Members O. Hodges and R. W. Redford.

APPEARANCES: *Elizabeth Forster, John Adema, and Ed Vanderkloet for the applicant; W. G. Posthumus and Joe Bittenbinder for the respondent; B. Fishbein and J. Duffy for the intervener.*

DECISION OF THE BOARD; May 21, 1980

1. At the commencement of the hearing in this matter the intervener made a preliminary motion that the Board should stay proceedings in the instant application for certification until the Board had issued its decision on Board File 2925-79-M. The intervener informed the Board that in File 2925-79-M the intervener had referred a grievance to the Board pursuant to section 112a with respect to alleged violations of a collective agreement by the respondent. The intervener argued that persons who voted in the representation vote in the instant application might not be in the bargaining unit and that such persons might not have been hired pursuant to the collective agreement. The intervener argued that since certain evidence would be the same in both proceedings and that since the Board had heard two days of evidence in File 2925-79-M, the instant proceeding should be stayed in order to minimize expense to the parties and possible opposite findings being made by the Board in the two proceedings. The applicant and the respondent opposed any delay in the instant proceeding and urged the Board to conduct the hearing in the instant application without delay. A majority of the Board ruled, with Mr. O. Hodges dissenting, that the Board would not

stay the instant proceeding until a differently constituted panel in File 2925-79-M issued its decision. The majority noted that the hearing in File 2925-79-M was not completed and that, in any event, the parties were not the same in both proceedings.

2. The parties signed the following agreed statement of facts:

“OLRB File No: 0186-79-R

Christian Labour Association of Canada

(“the Applicant”)

v.

Master Insulation Company Limited

(“the Respondent”)

v.

Int’l Association of Heat and Frost Insulators and Asbestos Workers,
Local 95

(“the Intervener”)

AGREED STATEMENT OF FACTS

- (1) A meeting was convened of all the parties at the office of Counsel for the Applicant, at 3:00 pm on March 6, 1980. The Intervener and its Counsel arrived after 3:00 pm. Before their arrival, there had been prior discussions between the Applicant and the Respondent as to voting arrangements satisfactory to them.
- (2) Upon arrival, Counsel for the Intervener took the position, from the outset, that no voting arrangements could be discussed as there could be no vote pursuant to the Board’s decision, dated February 1, 1980, because there were no employees in the voting constituency, i.e., employees as of the date of the Board’s decision.
- (3) After Counsel indicated that the Intervener would not discuss voting arrangements, Counsel for the Respondent would not answer questions as to where the employees were working and what they were doing, but the Respondent advised only that they were doing insulation work.
- (4) Counsel for the Intervener was asked to follow the ‘Registrar’s Instructions Regarding Vote’ for objecting to the Voter’s List, but he refused in accordance with his previously stated position.
- (5) The meeting then broke up. The time, date and place for the representation vote proposed by the Applicant and the Respondent were unknown to the Intervener and Counsel when they left the meeting.
- (6) The letter to the Registrar of March 6, from Counsel for the Applicant

and the Respondent was forwarded to the Board after a discussion with the Registrar and pursuant to his instructions after the meeting. No copy of this letter was forwarded by the Applicant, nor apparently by the Board, to the Intervener. It was subsequently received by the Intervener from the Board on request.

- (7) It is further agreed that the evidence of Joe Bittenbinder given before the Board on April 14, 1980, with respect to the subject employees was as follows:
- a) They were hired March 4 and 6, 1980, and both were terminated March 24, 1980.
 - b) They were hired as insulators in anticipation of an insulation job, the Respondent believed he would be awarded by Canada Packers. On March 29, the Respondent was notified that it did not get the said job despite prior notification that the Respondent was previously the low bidder. Accordingly, the Respondent terminated the said employees.
 - c) The said employees while waiting to work on the said project for Canada Packers were performing clean up as well as restorative work (painting and window caulking) on the Respondent's shop premises and did not leave those premises to perform insulation work on any construction site or project.

'E. J. Forster'
Counsel for the Applicant

'W. G. Posthumus'
Counsel for the Respondent

'B. Fishbein'
Counsel for the Intervener

3. The intervener argued that the vote should be set aside for four reasons. Firstly, the intervener did not have knowledge of the time, date and place of the representation vote until March 13, 1980, when it received a letter from the Board which incidentally mentioned this. The intervener did not have notice of the imposition of the silent period until March 14, 1980, when the silent period was some three days away. The intervener neither had knowledge at the meeting of the parties of the time, date or place agreed to by the applicant and the respondent nor did the Board forward a copy of these arrangements to the intervener. In addition, the intervener did not know where the employees were working because such employees were not hired through the intervener's hiring hall. Accordingly, the intervener argued it did not have an opportunity to campaign or conduct electioneering with respect to the representation vote. Secondly, the intervener argued that the jurisdiction for this vote

came from the decision of the Board dated March 10, 1980, which had amended a decision dated February 1, 1980. The intervener argued that the decision dated February 1, 1980, could not be the authority for the vote because there were no employees of the respondent in the bargaining unit on February 1, 1980. The intervener reasoned that on March 6, 1980, there was no jurisdiction to hold a representation vote and that this was recognized by the Board in its decision dated March 10, 1980. The intervener adopted the position that on the basis of the decision dated March 10, 1980, there was jurisdiction to order a representation vote but that the intervener was prejudiced because it went to the meeting and relied on the decision of the Board dated February 1, 1980. It was argued that the decision of March 10, 1980, was made without any evidence before the Board and the intervener pointed out that the respondent had refused to provide details about what the employees were doing. The intervener argued that as a result of the Board proceeding in this manner it had no opportunity to adduce evidence concerning whether there were employees in the bargaining unit and had been denied natural justice.

4. Thirdly, the intervener argued that the employees who voted in the representation vote were not entitled to cast ballots because they were hired in violation of a collective agreement which was binding on the respondent. The intervener maintained that any employees in the bargaining unit ought to have been hired through the intervener's hiring hall. The intervener argued that this was tantamount to support under section 12 of *The Labour Relations Act*. Fourthly, the intervener argued that even if the persons who did cast ballots were employees of the respondent they were not employees within the bargaining unit and were for that reason ineligible to cast ballots. The intervener stressed that the two employees who cast ballots in the representation vote had not left the respondent's office, had not been present on a construction site to do any insulation work and had actually been engaged in clean-up, painting and caulking windows. While the intervener conceded that the two employees who cast ballots may have been hired as insulation workers in anticipation of work, they did not perform insulation work.

5. The respondent argued that the bargaining unit defined in the decision dated February 1, 1980, defines the worker and not the work being performed and that the two employees were within the bargaining unit and therefore eligible to cast ballots in the representation vote. The respondent argued that to do otherwise would mean that the Board would have to determine the work of all voters. The Board was urged to consider the basis on which the two employees were hired by the respondent. The respondent argued that once the Board had decided to proceed it would be unfair if the respondent was in double jeopardy and that the question of the hiring should be dealt with by a differently constituted panel in the referral pursuant to section 112a of *The Labour Relations Act*. It was stressed that any advantage which had been lost by the intervener was as a result of its own conduct in that it did not follow the steps outlined in the Registrar's instructions to the parties. The respondent argued that the intervener had disregarded the Registrar's instructions to meet and make the voting arrangements and that there was no obligation on the respondent to advise a party, which has stated that it would not make arrangements for a representation vote, where and when the employees are working. The respondent pointed out that the intervener had been shown the names of the two employees at the meeting. The respondent attributed all of the intervener's problems to its failure to challenge the names on the list of voters and to underline their names in red. The respondent referred to an earlier statement by the Board that a representation vote would be held at such time when there were employees in the bargaining unit.

6. The applicant stated that it agreed with most of the respondent's submissions. Any prejudice which the intervener suffered came about as a result of the refusal of the intervener to follow the Registrar's instructions and meet with the other parties. The applicant emphasized that all of the parties were notified of the voting arrangements at the same time. It was pointed out that it was within the Board's jurisdiction to change its order and that in the context of fluctuations in employment in the construction industry it was feasible to conduct representation votes when there were employees available. The applicant joined the respondent in urging that a breach of a collective agreement ought not to concern this application. The applicant asked the Board to count the ballots cast in the representation vote and in the alternative to direct the taking of a new representation vote at such time when there are employees in the bargaining unit.

7. In the construction industry, applications for certification which require the Board to conduct a representation vote are arranged as quickly as possible. Where it is not possible to conduct such a representation vote immediately, the Board postpones the taking of the representation vote until there are employees in the bargaining unit. In these circumstances, it is often necessary to expedite the voting arrangements due to the nature of the construction industry where periods of employment are frequently brief. To this end, the positive co-operation of all parties is necessary. In the event that a party objects to certain arrangements for a representation vote, such objections should be made to the Board. Similarly, where any person, whose name appears on a list of eligible voters, is challenged by any party to the representation; such a person casts his ballot as a segregated ballot and the Board will investigate the challenge after the representation vote has been conducted. It is important for all parties to remember that usually time is very much of the essence in representation votes in the construction industry. In the instant application, the proper procedure would have been for the intervener to have participated in the arrangements for the representation vote and then to have filed its objections to the Board. In walking out of the meeting between the parties, the intervener has been the author of its own misfortune. Once the parties have made the arrangements for the representation vote, the Board may then direct the taking of the representation vote and may also define who is eligible to vote. The Board did not lack the jurisdiction to direct the taking of the representation vote once there were apparently employees in the bargaining unit.

8. There is no basis for finding that section 12 is applicable to this application. There is no evidence before the Board that any employer has participated in the formation or administration or has contributed financial or other support to either of the trade unions in this application. With respect to the alleged violations of a collective agreement by the respondent, the Board is of the view that the division of the Board which is in the process of hearing the referral under section 112a of *The Labour Relations Act* is the appropriate panel to consider such allegations and not the present panel of the Board.

9. In order to be eligible to cast ballots in the representation vote, the two persons who cast ballots must have been employees within the bargaining unit and the eligibility to vote depends on what an employee was doing not what he was hired to do. See the *Canadian Westinghouse Company Ltd.* case, [1966] OLRB Rep. Sept. 372; and the *Wragge Shoes Ltd.* case, [1969] OLRB Rep. Nov. 961. In the instant case the two persons who cast ballots were at no time performing the work of insulation mechanics or insulation mechanics' apprentices. The intentions of the respondent in the light of future work which appeared to be available is not determinative of the issue of eligibility to cast ballots in a representation vote.

10. The Board finds that neither of the two persons who cast ballots in the representation vote were entitled to cast ballots. The ballots cast in the representation vote will be destroyed unless a request is received within the next thirty days that the ballots be preserved.

11. A new representation vote will be conducted at a future date. The parties are directed to inform the Registrar at such time when the respondent employs persons in the bargaining unit.

2204-79-R Teamster Local Union 132, Chemical Energy and Allied Workers Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouse & Helpers of America, (Applicant), v. **P.R.C. Chemical Corporation of Canada Ltd.**, (Respondent), v. Group of Employees, (Objectors).

Certification – Evidence – Membership Evidence – Membership cards submitted not indicating \$1.00 payment – Union seeking to adduce oral evidence – Whether admissible – Rule 42 considered in light of Court's decision in *Fuller's Restaurant*

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and D. B. Archer.

APPEARANCES: Douglas J. Wray and Dennis Phillips for the Applicant; Brian W. Burkett, R. E. Henson, and W. Dorey for the Respondent; C. J. Abbass and J. Ryan for the Objectors.

DECISION OF VICE-CHAIRMAN, M. G. PICHER, AND BOARD MEMBER J. A. RONSON; May 26, 1980

1. This is an application for certification.

2. A group of employees has appeared as objectors to the application. Because of the possible overlap between the union's membership evidence and the list of objecting employees, it is necessary for the Board to determine the exact number of valid membership cards filed by the union.

3. There are 36 employees in the bargaining unit. The union filed 25 membership application cards with the Board. Three of those cards do not indicate that the employee paid an initiation fee of at least one dollar. The cards contain a space for the amount of the initiation fee to be noted; but in each case it was left blank.

4. At the hearing the union requested the opportunity to adduce oral evidence to establish that the employees in question each paid a one dollar initiation fee. Counsel for the respondent and Counsel for the group of employees objecting to the application opposed that request. The issue, therefore, is whether oral evidence is admissible to establish that the employees paid a minimum one dollar initiation fee when that does not appear on the face of the membership evidence filed.

5. In an application for certification the Board must, pursuant to section 7(1) of the Act, determine the number of employees in the bargaining unit who were members of the applicant union. Section 1(1)(j) of the Act provides the following definition:

“ ‘member’, when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and ‘membership’ has a corresponding meaning;

6. Section 92(2)(j) of the Act provides that the Board has exclusive power,

“to determine the form in which... evidence of membership in a trade union union...shall be presented to the Board on an application for certification..., and to refuse to accept any evidence of membership...that is not presented in the form...determined.”

7. The Board is also empowered under section 91(12) of the Act to determine its own practice and procedure, to make rules governing its practice and procedure and to prescribe such forms as it considers advisable. Pursuant to those powers Rule 48 provides for certain requirements which must be met before evidence of membership in a trade union will be accepted by the Board. Rule 48 provides:

“48(1) Evidence of membership in a trade union...shall not be accepted by the Board...unless the evidence is in writing, signed by the employee or each member of a group of employees...and, is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union...shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection 1.”

8. Rule 48 does not prescribe the actual words or form to be used in the documentary evidence of membership. It requires that such evidence, whatever its form, be in writing and be signed by the employee.

9. Rules of 48(1) and 48(2) appeared for the first time in the Board’s Rules of Procedure in 1960 as section 50(1) and 50(2). Those rules then provided for the first time that no oral evidence of membership would be accepted by the Board except to identify and substantiate written evidence filed in a timely fashion.

10. Before the regulations to *The Labour Relations Act* were extensively amended by O.R. 268/60, paragraph 7a of the then Form 2 Application for Certification read:

“The applicant submits with this application documentary evidence of compliance by employees of the standard of the Board respecting membership in the applicant for the purposes of certification, as follows:

- (a) individual applications for membership signed by the employees of the respondent, and
- (b) (i) individual receipts or duplicate receipts for payment of at least one dollar by employees of the respondent on account of the prescribed initiation fee or monthly dues of the applicant, signed by the payee or countersigned by the payor, or
- (b) (ii) evidence that the employees of the respondent have presented themselves for initiation, have taken the members' obligation or have done some other act consistent with membership in the applicant as follows:

11. The Board's early cases used that paragraph as the starting point to define what was required in the way of documentary evidence. It was then made clear that the applications for membership signed by the employee must contain or be accompanied by a written receipt for the payment of at least one dollar. The applicant in the instant case would argue, in effect, that that requirement no longer obtains or, if it does, it is only a technical requirement the failure of which can be overcome by the use of oral evidence at the hearing.

12. The requirement that a minimum payment of one dollar be made and be shown in writing on union membership evidence accepted by the Board has been the subject of considerable comment in previous Board decisions. That requirement has traditionally been imposed as a safety device to enhance the reliability of documents that are, of necessity, hearsay evidence. In *Leons Furniture Limited*, [1976] OLRB Rep. Feb. 8 at page 9 the Board expressed the rationale for the Board's membership evidence requirements as follows:

"...This notion of financial sacrifice seems to have been discussed first in *RCA Victor Ltd.*, 53 CLLC ¶17,067 (OLRB) wherein it was expressed that a money payment was necessary to constitute confirmatory evidence of the desire of the payer to become a member of the trade union. In other words, the Board was saying that it wants to be assured that the employees who are alleged to have become members have directed their minds and given careful thought to the implications of such a step. Moreover, the Board has time and time again emphasized that it must exact and protect stringent standards with respect to membership evidence in that other parties to a certification proceeding do not have the opportunity to examine the membership evidence nor in the usual case do parties have the opportunity to cross-examine the witnesses with respect to membership evidence. (See *Zehr's Markets Ltd.*, [1972] OLRB Rep. June 635.)

5. These requirements of the Board are clear and well known and we are loathe to deviate from them. Despite the apparent arbitrary nature of such rules they fulfill three important functions – cautionary, evidentiary, and channelling.

The *RCA Victor* case outlines the cautionary nature of the requirement and

Zehr's Markets Ltd. is representative of the evidentiary perspective. The third function – that of telling employees and trade unions how membership in a trade union can be obtained for the purposes of the Act – is important to both the Board and the parties. Clear and unequivocal rules in this important area provide the kind of predictability and certainty that is required for organizational purposes and minimizes the amount of “litigation” before the Board. Thus the certification process is expedited and the secrecy as to union membership provided under section 100 is accomplished. In other words, the more the Board deviates from its accepted practice the more parties will be encouraged to litigate the question of membership evidence with all the attendant costs of such disputes.”

13. While it is true that the Application for Certification (Form 1) no longer contains paragraph 7a nor any equivalent description of the requirements of documentary evidence, applicants are, nevertheless, on notice as to what the Board will require. That becomes clear by a review of the forms used in certification proceedings, the Board’s published decisions and the interpretation of the explicit requirements of membership evidence in section 1(1)(j) of the Act.

14. It is a well settled rule of statutory interpretation, generally referred to as the “mischief rule” or the rule in *Heydon’s Case*, that a tribunal interpreting a statute should look to four things to construe its meaning,

- 1) the common law before the legislation was enacted;
- 2) the problem or defect which the common law did not cure;
- 3) the legislative remedy prescribed by Parliament;
- 4) the reasons for the statutory remedy.

(See *Heydon’s Case* (1584), 3 Co. Rep. 7a; *Re Mayfair Property Co.* [1898] 2 Ch. D. 28 and see, generally, Langan (ed) *Maxwell on The Interpretation of Statutes* 12th ed (London, Sweet & Maxwell, 1969) pp. 40-43.)

15. These principles apply with particular force in the interpretation of section 1(1)(j) of the Act. That provision, defining “member of a trade union” for the purposes of the Act as including a person who has applied for membership and has paid an initiation fee or dues of not less than one dollar was enacted following the decision of the Supreme Court of Canada in *Metropolitan Life Insurance Co.* (1970), 11 D.L.R. (3d) 336. In that case the Court ruled that by not assessing the membership status of employees according to all of the terms of the union’s constitution and looking instead only to whether the employees had made a written application for membership and paid not less than one dollar as an initiation fee, according to its longstanding practice, the Board was asking itself the wrong question. The law as stated by the Court effectively struck down the Board’s requirement that generally a union must file written evidence of an application for membership and the payment of one dollar as proof of an employee’s union membership in an application for certification. Standing alone the *Metropolitan Life Co.* case threatened the introduction into the Board’s proceedings of technical and legalistic considerations that could bring the certification proc-

ess to a standstill. The Legislature, therefore, amended the Act by enacting section 1(1)(j), (*The Labour Relations Amendment Act 1970*, S.O. 1970, c. 3, s. 1). There can be little doubt that by so doing the Legislature intended to restore the status quo. By writing the provisions of that section into the Act, the Legislature effectively confirmed the Board's prior practice and made the twin conditions of an application for membership and the payment of at least one dollar substantive requirements to establish union membership in an application for certification. That view has been consistently reflected in the Board's practice.

16. Upon receipt of an application for certification, the Board's procedure now is to immediately send to the applicant union the Board's Form 2 Notice of Fixing of Terminal Date and Hearing Before the Ontario Labour Relations Board. Paragraph 2 of that form directs the applicant's attention to subsections (1) and (2) of section 48 of the Board's Rules and reproduces them verbatim. That form was sent to the union in due course in the instant case. It accompanied a letter from the Registrar to the applicant dated February 26, 1980 in which the union was advised that March 4, 1980 was the terminal date.

17. The same letter, following standard practice, advised the applicant that it must also complete and return Form 8, the Board's Declaration Concerning Membership Documents. That form must be signed by an officer of the union with direct knowledge of the application for certification. The union's officer is required to confirm that:

"3. (Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiations fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:"

18. There are numerous cases where the Board has rejected documentary membership evidence which did not indicate that the employees who had joined the applicant union had paid one dollar. In *Wheatley Manufacturing Limited*, [1964] OLRB Rep. Dec. 457, an issue arose as to whether the membership evidence submitted by the applicant union conformed to the requirements of the Board. In particular, there was some question as to whether there had been any initiation fee payments made by the employees to the union. The Board in summarizing its membership evidence requirements stated at page 457:

"The Board has certain well established requirements as to evidence of membership submitted in support of applications for certification. These requirements include... that applications for membership be made in writing, signed by the person said to be a member of the applicant; that each person said to be a member of the applicant pay to the applicant, on his own behalf, an amount of at least \$1.00 in respect of the prescribed initiation fee or monthly dues of the applicant; that this money payment be confirmed by a written receipt signed by the person who collected the money and counter-

signed by the person who paid the money, and that this evidence be supported by a declaration in Form 9 [now Form 8] with respect to the collection of the money. By section 50(1) [now 48(1)] of the Board's Rules of Procedure evidence as to representation must be in writing and by section 50(2) [now 48(2)] of the Rules, the Board is prohibited from accepting oral evidence of membership except to identify and substantiate the written evidence.

In the instant case the only written evidence of membership consists of the "memorandum of articles of association" referred to above. By that document the signatories declare themselves to be associated in a joint and common venture and agreed to be and to become members of the applicant. There was no written evidence or any money payment by any person alleged to be a member of the applicant. . . it is clear that this evidence does not meet the standards which the Board has consistently required to be met and accordingly this application must be dismissed."

19. The reasoning in the *Wheatley* case turns, in part, upon the requirement then expressed in paragraph 7a of the Form 2 Application for Certification that there be signed receipts for the payment of at least one dollar submitted with the membership documents. In the *Wheatley* case the Board addressed itself specifically to the prohibition to accepting oral evidence of membership, but did not decide the point since the oral evidence showed the payments to have been conditional on the success of the application, a condition which the Board has always found to be in breach of the requirement of absolute payment of the initiation fee.

20. The question raised in the *Wheatley* case was, in effect, the extent to which oral evidence can be adduced pursuant to section 48(2) of the Rules of Procedure to "identify and substantiate" the written documentary evidence previously filed with the Board. That issue was further explored in *Campbell Soup Company Limited*, [1966] OLRB Rep. Mar. 883. In that case there were filed with the Board membership cards which appeared to be defective with respect to the dates on which the membership documents were signed and receipted. Oral evidence was called going to the collection of the membership evidence. The employer and the objecting employees argued that the Board should not consider the oral testimony with respect to the documentary evidence and that such extrinsic evidence should be treated as inadmissible. The Board, after referring to section 50 of the Board's Rules of Procedure [now section 48] stated at page 886:

In this case the provisions of subsection 1 of section 50 with respect to the filing of the documentary evidence of membership have been complied with. The question remains as to whether or not the oral evidence heard by the Board in this case concerning the documentary evidence of membership falls within the exception provided by section 50(2). Since the oral evidence heard by the Board did not deal with the fact that the members joined the applicant union but rather was concerned with the time at which such persons joined the union, the Board finds that such oral evidence identifies and substantiates the written evidence and accordingly falls within the exception provided by section 50(2) of the Board's Rules of Procedure and is accordingly admissible.

21. In effect, the Board in *Campbell Soup* acknowledged that certain aspects of documentary membership evidence such as the dates on which union membership applications were signed and receipted are not substantive requirements of membership evidence and can therefore be the subject of oral evidence within the exception of section 48(2) of the Rules of Procedure. The Board has in other cases acknowledged that certain parts of membership documents, while desirable, are not strictly required. For example, in *Leons Furniture Limited*, [1977] OLRB Rep. Jan. 25 the Board found that membership cards were not invalid merely because they did not contain the signature of the person who collected the one dollar initiation payment. The signature of the collector, albeit an advisable precaution, is not a substantive requirement of membership evidence.

22. The question left unanswered in the *Wheatley* case was finally disposed of by the Board in a later decision which again focused on the difference between substantive and merely formal or technical defects in documentary membership evidence. In *Cooper-Weeks Limited*, [1969] OLRB Rep. Nov. 974, the membership evidence in support of an application for certification was defective in as much as there was no monetary payment shown on the face of the document. Counsel for the union requested leave to call oral evidence with respect to the payment of a one dollar initiation fee. The Board stated:

The Chairman of the panel cited section 48(2) of the Board's Rules of Procedure and Regulations which provides that no oral evidence of membership in a trade union shall be accepted by the Board except to identify and substantiate the written evidence of membership. The Board ruled that the evidence of membership as filed by the applicant by the terminal date of the application did not meet the Board's requirements in that it did not show that any of the persons who signed application for membership cards in the applicant paid at least one dollar on his own behalf. . . The Board further ruled that this was a substantive defect in the evidence of membership and not one which could be corrected by oral evidence under the limitations imposed by section 48(2) of the Rules.

23. In the *Cooper Weeks* case, the Board drew a critical distinction, emphasizing that a minimum one dollar payment is a substantive condition going to membership in the trade union. It cannot, therefore, be established by oral evidence. Oral evidence can, on the other hand, be adduced, as it was in the *Campbell Soup Company* case, to substantiate the document in some formal or technical way. It can, for example, be admitted to clarify the date upon which a membership card was signed. That information, like other technical data including the signature of a collector, does not reflect on the question of membership in the trade union, but merely goes to when an employee became a member and it is, therefore, admissible.

24. In a case similar, although converse, to the instant case, *Canadian Underwriters' Association*, [1974] OLRB Rep. Feb. 111, the membership evidence submitted to the Board prior to the terminal date consisted solely of receipts on account of membership fees. There were no applications for membership filed with the receipts, nor was there any other documentary evidence before the Board indicating that the persons on whose behalf the receipts were submitted had applied to join the applicant trade union. At the hearing the union requested leave to file additional membership evidence by an extension of the terminal date, or in the alternative, to adduce oral evidence of membership applications pursuant to Rule

48(2) of the Rules of Procedure. The Board, in rejecting the evidence and dismissing the applications stated:

Section 48(2) refers. . .to oral evidence of membership, and, even if the evidence of membership which the applicant desired to file with the Board were oral evidence, it would not merely identify and substantiate the written evidence respecting membership referred to. . .but would rather supplement the evidence respecting membership previously filed by the applicant.

25. In *Bernardin of Canada Limited*, [1975] OLRB Rep. Oct. 737 an application for certification was filed by Local 1590 of the IBEW. The membership cards filed in support of the application had reference only to the IBEW. The local number was left blank on each of the membership cards filed. The Board held that evidence of membership in the international may not be used as evidence of membership in the local. Counsel for the union in that case sought leave to introduce oral evidence in order to establish that the membership evidence filed in support of the application referred in fact to the local union. The Board, in rejecting that submission stated at page 738:

The Board furthermore is not prepared to permit oral evidence to be adduced in support of clarifying the intent of the applicant for membership in signing a card. We are of the opinion that it was not the intent of section 48(2) of The Board's Rules of Practice And Procedure to permit oral evidence "to identify and substantiate" the written evidence of membership with a view of perfecting inadequate evidence. If that were the case, the Board would be constantly waiving the privilege of the secrecy of membership evidence in order to permit trade unions to cure inadequate documentary evidence. . . We do not agree that an indiscriminate application of section 48(2) of the Board's Rules for the purposes cited by the applicant would necessarily dissipate "the cloud" on the documentary evidence or facilitate the disposition of the applicant's claim for bargaining rights."

(See also *Explorer Inns Limited*, [1978] OLRB Rep. June 541.)

26. The foregoing cases reflect a consistent thread in the Board's treatment of documentary evidence of union membership. The Board has found that oral evidence is admissible if it goes to supportive information such as the date when the membership evidence was obtained or the counter-signature of a collector. By virtue of section 48 of the Board's Rules and the policy reasons that underlie the rule, the Board has not permitted *viva voce* evidence to establish the two substantive conditions of membership as defined by the Act, namely, the application for membership and the payment of the one dollar initiation fee.

27. Counsel for the union submits that the foregoing cases and the Board's past practice must be reconsidered in the light of the decision of the Supreme Court of Ontario in *Fuller's Restaurant Limited*, 80 CLLC 14021, quashing the decision of the Board granting a certificate, [1979] OLRB Rep. May 395. In that case a group of employees filed a petition which they submitted was in opposition to the application for certification. The Board found that the wording of the petition was ambiguous and that it did not on its face constitute a statement in opposition to the union. Relying upon Rule 48, the Board declined to admit oral evidence which in the employees' submission would have clarified the true meaning of

the petition and the wishes of the employees who signed it. In so doing the Board departed from the less restrictive approach which it has taken in the past towards the wording of petitions drafted by rank and file employees, (See *Genwood Industries Limited*, [1976] OLRB Rep. Aug. 417; *Armbro Materials and Construction Limited*, [1976] OLRB Rep. Nov. 743.)

28. The Court found that the Board's decision too narrowly construed the requirements of section 48 of the Rules of Procedure. Reid, J., for the Court, concluded that the term "substantiate" in subsection 2 of section 48 must at least be broad enough to allow oral evidence to explain the meaning of a petition signed by employees, particularly where a letter accompanying the petition indicated that the employees opposed the union. According to the Court to conclude otherwise was improper, especially where the employees had been given no specific notice of the provisions of section 48 of the Rules of Procedure.

29. Counsel for the union submits that this case is analogous. He argues that what appears on the face of the union's cards is merely a technical defect, an ambiguity to be resolved by oral evidence.

30. We cannot agree. Firstly, the facts and considerations underlying the decision of the Court in the *Fuller's Restaurant* case are to be distinguished from the case at hand. In that case the substantive requirement of a statement of opposition to a union was already before the Board in written form, as required by section 48(1) of the Rules. The employees were entitled to call oral evidence to clarify written evidence that was already before the Board. In the instant case, the payment of at least one dollar is a substantive requirement going to proof of membership. Evidence that that amount has been paid is evidence of membership within the meaning of section 1(1)(j) of the Act. By the terms of section 48(1) of the Rules of Procedure that evidence can only be admitted if it is in writing and is received on or prior to the terminal date. For the reasons elaborated above, that rule is critical if the Board is to maintain the secrecy of employees' wishes and insure the integrity of confidential documents that are the key to certification.

31. There is a further distinction to be drawn between this case and *Fuller's*. The Board's adherence to the requirements of section 48 of the Regulations in this case raises no element of unfairness or surprise to the union. the substantive requirements of membership and the need for those requirements to be evidenced in writing before the terminal date is long standing and is well known to unions through the publication of the Board's decisions. Moreover, the applicant, itself a union well experienced before this Board, received from the Registrar a notice bringing to the applicant's attention the full text of subsections (1) and (2) of section 48 of the Board's Rules of Procedure. Further, the union's representative signed the Form 8 Declaration Concerning Membership Documents with its explicit reference to the payment of initiation fees shown on the documentary evidence filed. In all of these circumstances the union can scarcely be heard to say that it was surprised or unaware that it must satisfy the substantive elements of union membership in writing before the terminal date. The union knew, or should have known, what is required. This is, therefore, not a case where the Board should either extend the terminal date or, what would amount to the same thing, hear oral evidence either at the hearing or through one of the Board's field officers respecting the payment of the initiation fee by the three employees concerned. The Board is satisfied that there is nothing in that conclusions inconsistent with the decision of the Court in *Fuller's Restaurant Limited*.

32. The Board must always be mindful of the need for expediency, for secrecy and for integrity in the admission of membership evidence. Its rules may at times seem onerous, but they must be preserved if in the end litigation is to be minimized so that the process of certification can go forward with certainty and efficiency, to the ultimate benefit of all applicants for certification. For all of the foregoing reasons, therefore, the Board declines to hear oral evidence going to the payment of the initiation fee in respect of these membership application cards. Since the cards do not constitute satisfactory membership evidence within the meaning of the Act and Regulations, they must be discounted.

33. The Registrar is instructed to list this matter for continuation of hearing. The purpose of the hearing will be to hear evidence and representations in relation to the petition, the charges filed, and any other matter that might be outstanding.

DECISION OF BOARD MEMBER D.B. ARCHER:

1. The Applicant Union in this case was careless in submitting its membership evidence. Three of the membership cards did not show that at least one dollar had been paid by the person who signed the card. The Union, at the hearing, wanted to lead oral evidence to establish that these persons did, in fact, pay at least one dollar to the Union. The majority of the Board has refused to hear this evidence.

2. In my opinion, the majority is being unduly technical in its approach to membership evidence in this case. Where there is an allegation of "non-pay" or "non-sign", the Board, as a preliminary matter, will appoint an officer to investigate. I appreciate that in the "non-pay" case, there is documentary evidence of payment to support an allegation of fraud, the situations are similar. To preserve the secrecy of the membership evidence, and to establish whether a payment was made, the Board could appoint an officer to investigate whether any money was paid to the Union.

3. The majority has relied upon the legal difference between a technical irregularity, such as a missing date, and a substantive defect in membership evidence. I am not persuaded that there really is a difference between the two types of defects. A date missing from a card is usually a failure by the collector to fill in the blank space on the card left for the date; similarly, the amount of money paid is a similar type of omission, that is, the failure to fill in a blank space on the card. Since the Board will receive oral evidence with respect to the former, I believe that it should also receive oral evidence to cure the latter defect.

4. The Board in this case is, in my view, being unduly technical in the application of its rules. I would have admitted the oral evidence sought to be introduced by the Union.

2344-79-R The Women's Christian Association of London, owner and operator of **Parkwood Hospital**, London, Ontario, Applicant, v. Ontario Nurses Association, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Sale of a Business – Transfer of part of hospitals operations – No intermingling of employees – Whether new unit appropriate – Section 55 preserving existing bargaining rights

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members C. G. Bourne and W. F. Rutherford.

APPEARANCES: *Carmen Dyer and F. G. Jones for the applicant; Kathleen G. O'Neil, Donna L. Alexander, Ann Pike and Liz Woods for the respondent; Audrey McCaffrey and Myrtle Purdon for the objectors.*

DECISION OF THE BOARD; May 28, 1980

1. This is an application under section 55 of *The Labour Relations Act*. There are two principle questions before the Board:

- (a) Has there been "a transfer" of a "business" within the meaning of section 55, from Victoria Hospital Corporation ("Victoria") to the Women's Christian Association of London, owner and operator of Parkwood Hospital, London ("Parkwood"); and;
- (b) if there has been "a transfer of a business" from Victoria to Parkwood, should the bargaining rights of the respondent Ontario Nurses' Association ("ONA") be preserved, either for the original Victoria facility, or for some restructured bargaining unit determined pursuant to sections 55(4) and 55(6) of the Act.

2. Prior to the series of events leading to the present application, there were three unrelated hospitals located in the southern part of the City of London: Victoria Hospital, an active treatment hospital with a capacity of 1,000 beds; Parkwood Hospital, a chronic care facility located on Grand Avenue, with a capacity for 185 patients; and a "veterans hospital" operated by the Federal Government on a parcel of 300 acres known as the "Westminster Site". On the Westminster site there was a main building and two subsidiary buildings: the "Western Counties Wing" providing domiciliary care for up to 180 persons (i.e. similar to an old aged home), and the "Medical Annex No. 2" providing care for up to 290 chronic care patients. It is the transfer of the "Western Counties Wing" and "Medical Annex No. 2" from Victoria to Parkwood with which we are here concerned.

3. The transfer to Parkwood of the Western Counties Wing, and Medical Annex No. 2, was part of a complicated series of transactions between Parkwood, Victoria, and both levels of government. It is unnecessary to review the details of these property transfers and financial undertakings. It may be useful, however, to set out some of the background leading up to the ultimate transfer of the subject facilities from Victoria to Parkwood.

4. In or about May, 1977, the Federal Government decided that it no longer wished

to continue operating its three facilities on the Westminster site, and entered into an arrangement with the Ontario Government whereby responsibility could be transferred to appropriate entities within Provincial jurisdiction. In or about June, 1979 Victoria Hospital acquired responsibility for the care and treatment of these patients. Victoria received certain financial and property considerations, and was to make arrangements for a further transfer, to Parkwood, of the responsibility for the domiciliary and chronic care patients located in the Western Counties Wing and Medical Annex No. 2. In return, Parkwood would also obtain certain property and financial considerations. This second transfer (which gives rise to the present application) was completed in January, 1980.

5. Parkwood considers its Grand Avenue premises to be inadequate, and hopes to construct an entirely new hospital complex on the lands acquired on the Westminster site. Until it does so, it will continue to operate at two geographically separate locations. The old premises on Grand Avenue are about two miles from the Westminster site. Parkwood hopes that the new hospital complex will be completed by 1983, so that it can consolidate all of its operations and responsibilities in a modern facility on the Westminster site. Apparently Victoria also hopes to acquire better facilities on the Westminster site. The provincial government hopes to achieve an efficient organization of autonomous health care units located in close proximity to one another.

6. On January 25, 1980, responsibility for the care and treatment of patients in the Western Counties Wing and Medical Annex No. 2 was transferred from Victoria to Parkwood. There was no interruption in patient care, nor was there any transfer of patients from the Westminster site to Parkwood's Grand Avenue location, or vice versa. Parkwood acquired the patients' medical records, custody of their belongings, and all of the equipment ordinarily used in their care and treatment, including: ward equipment and medical supplies, housekeeping supplies, and physical and occupational therapy equipment. The title to the real property remains somewhat confused, although both the Federal and Provincial Governments have assured the parties this will not be a problem. The patients' "canteen" continues to operate pursuant to a new committee established by Parkwood.

7. Parkwood pays Victoria a rental fee for use of the buildings and for heat, light, maintenance and garbage services. Parkwood also acquires a number of other services from Victoria on a subcontract basis. These include: food supply, access to Victoria's central supply depot, pharmacy, laundry, diagnostic and laboratory services. Michael Boucher, Assistant Executive Director for Parkwood, emphasized that these arrangements were purely a matter of convenience. Parkwood retains both its autonomy, and the right to satisfy its needs elsewhere if it becomes economical to do so. The service agreements with Victoria can be terminated on six months' notice. When the new complex is completed in 1983 it is anticipated that there will be changes; although Boucher noted that it may still be appropriate to maintain certain shared service facilities.

8. The patient care provided by physicians has been maintained. These physicians have become associated with Parkwood, have medical privileges with Parkwood, and are involved in at least administrative duties at the old Parkwood location. Similarly, Parkwood's medical staff as privileges at the Westminster site. Parkwood's administrative staff now services both locations. There is a single Board of Directors and Executive Director. There is one Finance and Personnel Department. The department heads have not changed, however, at the Westminster site, there is substantial continuity of first and second level man-

agement of the nursing staff. These individuals now report to Ms. Hazelwood, Parkwood's Director of Nursing.

9. Ms. Hazelwood agreed that the Westminster site is a "self-contained unit for nursing care". There is no interchange of full-time employees between the two sites. There are certain shared continuing education programmes (about one per month), and the rehabilitation co-ordinator visits both sites; however, the duties of the former Victoria employees are confined to the Westminster location. Similarly, none of the full-time nurses from Parkwood's Grand Avenue site perform any duties at the Westminster location. Ms. Pike, a former Victoria employee who continues to work for Parkwood at the Westminster site, testified that her supervisor remained the same, and there was no substantial change when the operation was taken over by Parkwood. She also testified that the nurses were informed prior to the transfer, that they would not be moved from the Westminster site.

10. None of Victoria's part-time employee complement has been transferred, or become employees of Parkwood. Some of Parkwood's part-time employees are used on an occasional, or casual basis to cover for illness, vacation or leaves of absence at the Westminster site; but, there is no evidence of a permanent part-time staff at the Westminster site (i.e. individuals regularly working at that site on established shifts of less than twenty-four hours per week). It would appear that the 45 part-time employees in Parkwood's part-time pool, only provide casual relief at the Westminster site on a sporadic basis. Parkwood's nurses employed at Grand Avenue are not represented by a trade union.

11. The respondent Ontario Nurses Association was the bargaining agent for full-time and part-time nurses employed by Victoria, *inter alia* in the transferred facilities. There were two separate bargaining units – one for full-time employees, and one for part-time employees. There is a subsisting collective agreement with respect to the full-time unit. The agreement respecting the part-time unit was being renegotiated at the time of the transfer. On the basis of the evidence before us we have no hesitation in concluding that there has been a "sale" of "part of Victoria's business" from Victoria to Parkwood. The term "business" in section 55, is used in a general sense, and extends to the activities of hospitals, universities, Boards of Education, municipal corporations and other service undertakings which are subject to *The Labour Relations Act*. There is really no doubt that within this context, "part of the business of Victoria", (i.e. the care of certain patients and the means to provide that care,) has been transferred to Parkwood. There remains the question of the desirability of continuing the union's bargaining rights within the bargaining structure established by the predecessor. The statutory provisions relevant to this determination are as follows:

"55(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection 3; or
- (b) any person, trade union or council of trade unions claims that, by

virtue of the operations of subsection 2 or 3, a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection 3 with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

55(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.”

12. The approach which the Board takes in circumstances such as those presently before us, is as set out in *City of Peterborough*, [1979] OLRB Rep. Feb. 133 at p. 134;

“The consistent point of departure in the decisions of the Board in applications under section 55 of the Act is a recognition that the primary purpose of the section is the preservation of employees’ bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing. Thus while the remedial scope of the section allows the

Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all of the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union with the interest of both the employer purchasing the undertaking as well as the interests of that employer's existing employees and their union. In the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structures. (*Oshawa Wholesale Ltd.* [1965] OLRB Rep.Feb.504; *The Copr. of the City of Kitchener* [1973] OLRB Rep. June 306; *Yarntex Perth, Division of Yarntex Corporation Ltd.* [1975] OLRB Rep. Feb. 137).

A particular concern in the determination of bargaining units under section 55 of The Labour Relations Act is that existing bargaining structures not lightly be interfered with. The Board recognizes the value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication and has come to reflect a workable pattern of mutual expectations between union and employer. Since the promotion of sound collective bargaining relationships is what the Labour Relations Act is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time."

Similar views were expressed in *Loblaws Groceries Co. Ltd.* [1973] OLRB Rep.Jan.73 where the Board preserved a union's bargaining rights in a single retail store and declined to redefine the bargaining unit to include all stores in the municipal area as it would have done had the union applied for certification for that one store. The Board emphasized that the purpose of section 55 is to *preserve* bargaining rights, and that in order to do so it may be necessary to continue a bargaining structure which might not have been considered "appropriate" if the union had applied for it on an application for certification. In the present case of course, a full-time, and part-time unit at the Westminster site would probably have been considered appropriate even on an application for certification. The general practice of the Board has been to allow employees at each existing location, to select a bargaining agent of their own choice (see, for example: *Extendicare* Board File 1585-77-R; decision released February 10, 1978 – unreported).

13. Having regard to the purpose of section 55, the Board is satisfied that it should preserve the established bargaining structure, unless there are compelling reasons to do otherwise; and, on the basis of the evidence before us, we are not satisfied that such compelling circumstances exist as would justify an alteration of the collective bargaining status quo. The full-time unit can remain a self-contained entity for collective bargaining purposes in the same manner as it apparently is with respect to the delivery of nursing care. The part-

time unit likewise can remain as it is – a mirror image of the full-time unit with terms and conditions of employment negotiated with reference to that unit. When part-time employees work at the Westminster site, they will do so pursuant to a collective agreement. We do not think that this should pose any serious administrative difficulties for Parkwood, and, in any case, since the part-time agreement is currently being renegotiated, the parties can address such problems at the bargaining table.

14. Having regard to the foregoing the Board declares that there has been a sale of “part of” Victoria’s business to Parkwood and that the respondent continues to represent the full-time and part-time nurses employed at the Western Counties Wing and Medical Annex No. 2. It follows that the “full-time” collective agreement with the predecessor will continue to apply to the “full-time” employees of the successor employed in these two facilities; and that the respondent is entitled to give notice to bargain with respect to the part-time employee unit.

1680-79-U United Electrical, Radio and Machine Workers of America (UE), Complainant v. R.C.A. Limited, Respondent

Discipline – Section 79 – Employees discussing union organizing during coffee breaks – Whether employer suspending employee for engaging in protected activity

BEFORE: E. Norris Davis, Vice-Chairman and Board Members J. D. Bell and H. Simon.

APPEARANCES: *Arthur E. Jenkin and J. McBride for the applicant; W. J. McNaughton and M. Monteith for the respondent.*

DECISION OF THE BOARD; May 23, 1980

1. The complainant alleges contraventions of section 56, 58(c) and 61 of the Act in the disciplinary suspension of five and one-half hours administered by the respondent in November 19, 1979 to Mr. J. G. McBride.

2. Mr. J. G. McBride is employed as a junior design draftsman and played a key role in organizing employees of the respondent. This culminated in the issuance of an interim certificate by the Board on November 16, 1979, following a Board hearing on November 6, 1979.

3. Mr. Don Legget, Manager Equipment Engineering and Facilities Control, has the responsibility for design drafting in which department Mr. McBride is employed in a job entailing about 75 per cent drafting board work and 25 per cent looking at equipment, researching catalogues. Mr. Legget states that Mr. McBride’s work does not call for him to be in the administrative office area (which is separate from the plant office area) which includes Accounting and Purchasing Departments. Mr. McBride in his evidence testified that his duties required him to go to the Accounting Department to get accounting approvals for proposed purchases, perhaps, ten times in a period of several months. Mr. McBride also

states he might go to Purchasing twenty times over the same period to look at catalogues. The Board accepts Mr. McBride's testimony on this point on the grounds that Mr. Legget's responsibilities were administrative and he relied on design engineers for evaluation of technical performance and is therefore less likely to know in detail minute job content details.

4. Mr. Legget on June 20, 1979 interviewed Mr. McBride in connection with his annual performance review in which both Mr. McBride's attendance and punctuality records were characterized as "unsatisfactory", and, his overall performance was rated as "somewhat below standard". The proposed plan for Mr. McBride was to "retain in present position". Mr. Legget testified there were discussions at this time with Mr. McBride relating to Mr. Legget's view of Mr. McBride's "casual approach". Mr. Legget based his characterization on the fact that Mr. McBride had been regularly coming in late and that the quality of his work suffered from too many errors, omissions and lack of attention to detail. Mr. McBride disagreed with the evaluations and refused to sign the Evaluation Form, and arranged a further meeting with Mr. Legget to assess some examples of his work.

5. In October 1979, there was a performance review of all salaried employees as part of a new salary administration program. On October 15, 1979, Mr. Al Vermeulen, Mr. Legget's immediate supervisor, had a performance review interview with Mr. McBride. Mr. Legget sat in on the interview at which the evaluation was discussed with Mr. McBride. The evaluation recorded that "he has not improved his unacceptable level of attendance and punctuality and refuses to recognize it as a problem", and his attendance and punctuality records were again characterized as "unsatisfactory", and his overall performance evaluated as "meets minimum". Mr. McBride was advised that because of his continuing performance his salary would not be increased and that he would be placed on three months probation, at the end of which period if his performance had not improved, he would be dismissed. Mr. McBride initialled the evaluation form. He denies that there was any discussion with him at that time about "being out of department". Mr. Legget's testimony is that over the period of January 1979 to October 1979, he had received complaints, principally from the Purchasing Manager, about Mr. McBride being in areas that he had no business in and that these were discussed with Mr. McBride on October 15th and on several prior occasions. Mr. McBride's evidence is in direct conflict with Mr. Legget's on the point of any discussions taking place prior to October 30th in respect to Mr. McBride's being unnecessarily in other departments.

6. Mr. Legget testifies that following the October 15th discussion, he continued to get calls from other managers complaining of Mr. McBride's activities. On October 30th, Mr. Legget had Mr. McBride in to his office and told him the complaints were continuing. Mr. McBride was then given a specific assignment in respect to the filing of screening machine drawings which would require him to remain entirely at his work location. Mr. Legget states that this was an assignment which needed to be done and it was his intent to determine whether Mr. McBride intended to comply with instructions. Mr. Legget also states that as of October 30th, he was not aware of Mr. McBride's involvement in the application for certification, and that it was later that week that Mr. Legget heard that a petition had been circulating on the production floor and was torn up and that Mr. McBride was "involved in it".

7. On November 6th, the day of the certification hearing, Mr. McBride was in attendance at the hearing, having told his supervisor on November 5th that he would not be in to work. Mr. Legget states that following November 6th, the "wandering about the plant dete-

riorated rapidly” and that Mr. McBride on some days spent more than one-half of his time away from his drafting board. It was decided on November 12th to call Mr. McBride in for discussion, and Mr. McBride was then given a written memorandum, reading as follows:

“On October 30, 1979, you were assigned to integrate new screening machine drawings into a new file. You were advised by your supervisor, D. Legget, to remain within the department and to apply yourself to this assignment.

Since that date, there have been many occasions when you were away from your workstation, without legitimate reasons.

You have been observed in areas of the plant in which you had no business dealings, such as PRAM, Implosion Proofing, etc. Also, progress on your assignment to integrate screening machine drawings in a new file has been completely unsatisfactory.

You are instructed to remain at your workstation, working on your assignments, and only leave the department for coffee breaks at 10:00 am and 3:00 pm respectively and for lunch at 12:00 pm. Failure to comply with this instruction will be grounds for disciplinary action.”

Mr. Legget states that employee coffee breaks are generally taken at 10:00 a.m. and 3:00 p.m., but in view of the nature of the work there are variations and that it is not in general, strictly adhered to. He states that he had been getting no response to his verbal instructions to Mr. McBride and that in the November 12th discussions, Mr. McBride enquired if he was entitled to a coffee break to which Mr. Legget replied affirmatively. Mr. McBride then asked as to the time for his break, and Mr. Legget specified it.

8. At 2:00 p.m. on November 16th, Mr. Legget received a phone call from Mr. Young, Manager of Materials, who asked Mr. Legget to come to his office stating that he was annoyed at Mr. McBride having been in the Purchasing Department from 9:30 a.m. till after 10:00 a.m. that day and that he didn't want Mr. McBride in the area. Mr. Millward, Manager of Purchasing and reporting to Mr. Young, joined Mr. Legget and Mr. Young in Mr. Young's office. According to Mr. Legget, Mr. Millward reported that he had observed Mr. McBride in Mrs. Vicki Lamb's office approximately 9:30 a.m. and observed him leaving that office “sometime after 10.00 a.m. – 10:05 – 10:10”. Mrs. Lamb is Traffic Clerk working in the Purchasing Department. Mr. Legget states that there is no reason for his department, in which Mr. McBride works, to be involved with the Traffic function and he knows no reason why Mr. McBride should be there. Mr. Millward at the meeting advised Mr. Legget that he had been asked by Mr. Young to investigate what Mr. McBride was doing with Mrs. Lamb on that day.

9. Following this meeting with Mr. Young and Mr. Millward, Mr. Legget met with Mr. Monteith, Director of Industrial Relations. It was then decided that there had been a clear refusal to abide by instructions and that Mr. McBride should be suspended for one day. Mr. Legget testified that the factors considered in the decision were Mr. McBride's performance reviews and failure to follow specific instructions.

10. Mr. Vermeulen, Mr. Legget's supervisor, was absent on that day, and at 4.00 p.m. Mr. Legget met with Mr. McBride in Mr. Vermeulen's office. Mr. Legget states he explained to Mr. McBride that he had received another complaint from Mr. Millward that Mr. McBride had been in Mrs. Lamb's office from 9:30 a.m. – 10:00 a.m., and that this was contrary to the agreement of November 12th and that, therefore, Mr. McBride would be suspended for one day on November 19th without pay. Mr. McBride then denied being in Mrs. Lamb's office at those times, asked to be excused and was absent for five minutes. On his return he requested that Mr. Monteith join the meeting. Mr. Monteith and Mr. Legget then re-discussed the situation with Mr. McBride who again denied the times and requested to have the suspension in writing, to which Mr. Legget agreed. Mr. McBride left the office about 4:30 p.m. Mr. McBride's version of this incident is substantially the same as Mr. Legget's except that Mr. McBride testifies that he asked Mr. Legget if Mr. Young and Mrs. Lamb could be present to clarify the matter, and Mr. Legget responded that he had already spoken with Mr. Young and was not interested in Young further. Mr. McBride states he renewed his request for Mr. Young's presence when Mr. Monteith joined the meeting, and Mr. Monteith stated Mr. Young had talked to Mr. Legget and was in agreement. Mr. Legget denies that Mr. McBride requested either Mr. Young or Mrs. Lamb to be present.

11. On Monday, November 19th, Mr. McBride reported for work at his usual time (he having talked to a union representative and explained his concern about having nothing in writing and it being thought best for him to report). Mr. Legget met with Mr. Vermeulen to inform him of the events of November 16th. They proceeded to Mr. Monteith's office where they were joined by Mr. Millward and Mr. Young. Mr. McBride was called to Mr. Monteith's office about 10:00 a.m. and Messrs. Monteith, Vermeulen and Legget were present, and Mr. McBride was handed the written suspension reading,

“On November 12, 1979 you attended a performance review discussion where details of your totally unsatisfactory job performance were explained to you. Of particular concern in this review, was your disregard of instructions to remain within the department and apply yourself to your assignments and specific times for morning, afternoon breaks and lunch.

A written summary of this review was presented and acknowledged by you along with a warning that continued disregard of these instructions would be grounds for disciplinary action.

On Friday, November 16, 1979 you were observed in the office of Ms. Vickie Lamb for a minimum of one-half hour starting prior to 10 o'clock.

As a result of this continued disregard of instructions, you are suspended without pay for one day, Monday November 19th, 1979.”

Mr. Legget states Mr. McBride was hostile and upset and stated he was being discriminated against for his union activity. At Mr. McBride's request Mr. Carl Kiebel, a technician, joined the meeting, Mr. McBride read the letter, Mr. Kiebel acknowledged it, and Mr. McBride informed the Company they would hear further about it.

12. Mr. McBride states that at this latter meeting when he was first given the letter of November 19th by Mr. Monteith, that Mr. McBride asked "if they would accept signed statements of employees that he had had his coffee break at 10:00 a.m." and Mr. Monteith refused. Mr. McBride also states that he again asked "Are you still refusing to accept signed statements about my coffee break?" to which Mr. Monteith replied "Yes". Mr. Legget in cross-examination replied to a question as to whether he recalled Mr. McBride offering written and signed statements verifying his position, he replied "At that time, No": When asked if he recalled Mr. Monteith refusing documents, he replied, "No, I recall Mr. Monteith saying we are not prepared to debate the issue". It seems to us that the two lines of statements are not incompatible in that Mr. McBride, in asking whether signed statements would be accepted, is not seen by us as then proffering such written statements, whereas the questions to Mr. Legget and his replies appear to be based on such an actual proffering.

13. The evidence is contradictory as to whether Mr. McBride breached the instruction of November 12th by being absent from his work station at other than the specified times on November 16th. The respondent in its letter of November 19th makes clear that the disciplinary action was based on a disregard of instructions to Mr. McBride to remain in his department, as outlined in the November 12th letter, except for "coffee breaks at 10:00 a.m. and 3:00 p.m. respectively and for lunch at 10:00 p.m.". The letter of November 19th to Mr. McBride states, "On Friday November 16, 1979 you were observed in the office of Mrs. Vickie Lamb for a minimum of one-half hour starting prior to 10 o'clock". Mr. Legget testified, as noted above, that the action was taken based on a report that Mr. McBride had been in the Purchasing Department from 9:30 a.m. till after 10:00 a.m. on November 16th. Mr. Leggett testified that this report had been secured from Mr. Millward in the meeting between Messrs. Young, Millward and Legget at which Mr. Millward stated he observed Mr. McBride in Mrs. Lamb's office at "approximately 9:30 a.m.". Mr. McBride, on the other hand, testifies categorically that he was not present in Mrs. Lamb's office prior to 10:00 a.m., and Mr. Millward testified that Mr. Legget's statement that he (Mr. Millward) had said in the meeting on November 16th that he had seen Mr. McBride in Mrs. Lamb's office at 9:30 a.m. was incorrect.

14. Mrs. Vickie Lamb testified that she did not arrive at the plant until 9:45 a.m. on that day, having phoned her supervisor, Mr. Baldwin, to advise she was having car problems. On arrival she went immediately to Mr. Baldwin's office to announce her arrival. According to Mrs. Lamb, Mr. Baldwin and Mr. Ernie Millward were in the office and Mr. Millward made the comment that "that's what you get when you stay out late at night". Mrs. Lamb then hung up her coat, went to the washroom and started work about 9:55 a.m. Mr. Millward testified that he was in Mr. Baldwin's office at "9:45 - 9:50 somewhere in there" and when asked in chief whether Mrs. Lamb spoke to him while in Mr. Baldwin's office, he replied, "I can't recall". On the other hand, Mr. Millward also testified that, at the time, when he went into Mr. Baldwin's office that he then observed Mr. McBride with a cup of coffee sitting beside Mrs. Lamb in Mrs. Lamb's office. Mr. Millward states that Mrs. Lamb and Mr. McBride normally get together for coffee and he was not surprised to see them together.

15. Mrs. Lamb further testified that she and Mr. McBride had arranged the previous day to get together for coffee, and that he arrived at her office at about 10:00 a.m.. She states she looked at her watch when he arrived because she (along with other members of the Union Steering Committee) knew Mr. McBride was under restrictions and that he

would be in trouble if out of his area at other times. She states she was busy on the phone and with paperwork the entire period that Mr. McBride was there which was 10 – 15 minutes.

16. Mr. Millward acknowledges that he had made several previous complaints to Mr. Legget about Mr. McBride spending excessive time with Mrs. Lamb on coffee break and thereby interfering with Mrs. Lamb's work. He states he was aware of the October 30th restriction on Mr. McBride and states, "I probably caused that, this disruption was not new". This tends to corroborate Mr. Legget's evidence that in the preceding months the principal source of complaints about Mr. McBride came from Mr. Millward. The Board can only speculate as to whether Mr. Millward was also aware of the November 12th instruction to Mr. McBride, and if he was, why he didn't take action on his own initiative at the time he says he saw Mr. McBride and Mrs. Lamb together at 9:45 – 9:50 a.m. rather than taking action only after Mr. Young's instruction to him.

17. Mr. Frank Robinson, who works in the same department as Mr. McBride, testified that on November 16th he was on his way to coffee break at 9:52 a.m. when he spoke to Mr. McBride, who was at his drafting board, and invited him to come along. Mr. McBride stated that "he couldn't go". Mr. Robinson fixed the time by saying that he automatically looked up at the clock on the wall. Mr. Robinson also states that he was aware of Mr. McBride's restrictions and that Mr. McBride had refused to accompany him on other occasions because it was too early. He testified that Mr. McBride was still at his desk when Mr. Robinson left and that when he returned 20 – 25 minutes later he believes Mr. McBride was there but could not be positive. Mr. Robinson states that between 2:00 p.m. – 3:00 p.m. on the same day, Mr. McBride approached him and asked if he remembered what time he had gone for coffee. Mr. Robinson said he did, and Mr. McBride stated "I hope you continue to remember because I may ask you to state that position to the Company". Mr. Robinson states he had a similar conversation the following day when Mr. McBride came to his house and said he had received a verbal suspension.

18. Mr. Millward testified that it was shortly after 10:00 a.m. on November 16th that Mr. Young, his superior, came into Mr. Baldwin's office and asked Mr. Millward to step out and they went to Mr. Millward's office, and Mr. Young instructed him to go in and investigate why Mrs. Lamb and Mr. McBride were together. Mr. Millward states Mr. Young suspected they were working on union business. When asked if Mr. Young was upset, Mr. Millward replied, "We had been given a directive that union business was to be conducted off premises and on our time. We were just following through." Mr. Millward was on his way to Mrs. Lamb's office when he was interrupted by a telephone call which went on for close to ten minutes. From the point at which Mr. William took the phone call, he could see into Mrs. Lamb's office and he states Mr. McBride was in there, finishing a cigarette and Mrs. Lamb was working on papers and chatting. When he hung up the phone Mr. McBride was still there. Mr. McBride then left and Mr. Millward closed the door to have a discussion with Mrs. Lamb about "things in general". Mr. Willward states that Mrs. Lamb had developed over time from a below average employee to one above average. He testified that he then told Mrs. Lamb that "she was very foolish. I felt as her boss, I had invested a lot of time and effort in her and she was jeopardizing that. She was not handling the situation very well". He asked if she and Mr. McBride had been talking union and Mrs. Lamb stated it was strictly a general discussion. Mr. Millward was asked if he told Mrs. Lamb she should not be seen with Mr. McBride, and states that he indicated that the way Mr. McBride spending so much time in the department, it was disrupting the department. When asked if he had told

her that as a union organizer she was “up front” and should watch herself. Mr. Millward said, “Yes, the visibility was there; not particularly the union thing. Certainly the union activity was there. Just being handled blatantly”.

19. Mrs. Lamb testified that when Mr. Millward came into her office he opened the conversation by “Is that union business Vicki, because if it is” and Mrs. Lamb interrupted to say “No, it wasn’t” and asked why Mr. Millward would think that. According to Mrs. Lamb, Mr. Millward stated that Mr. Clay Young had come to him and told Mr. Millward “he didn’t want Jerry and I together and to get him out of there – he didn’t want us seen together at all”. She also testified that Mr. Millward told her that she should not be seen with Mr. McBride at any time because whenever they saw us, they automatically assumed it was union business.

20. Mrs. Lamb states that on Monday, November 19th, at about 10:00 a.m. she asked Mr. Millward if he knew what time Mr. McBride had been in her office, to which Mr. Millward shook his head and said “I don’t know. I can’t know.” He enquired why Mrs. Lamb was concerned, to which Mrs. Lamb replied she was merely curious. Mr. Millward in his cross-examination explains that he had no previous involvement with a union and just didn’t want to get involved in an argument, but to conduct business as usual.

21. There is no dispute in the evidence, but that Mr. McBride left Mrs. Lamb’s office around 10:15 a.m. on November 16th. The Board is faced with the difficult task of resolving the conflict in evidence of Mrs. Lamb and Mr. Millward in respect to when Mr. McBride first arrived in Mrs. Lamb’s office. Mr. Legget states he was told by Mrs. Millward on November 16th that Mr. McBride was in the office at 9:30 a.m. Mr. Millward, on the other hand, says this couldn’t be inasmuch as he first saw Mr. McBride in Mrs. Lamb’s office on his way into Mr. Baldwin’s office at about 9:45 – 9:50 a.m. Mrs. Lamb states that she was not in her office till 9:55 a.m. and Mr. Robinson and Mr. McBride state Mr. McBride was at his desk in the drafting room at 9:52 a.m.

22. We accept as credible Mrs. Lamb’s testimony as to her time of arrival at the plant. It would be natural for a late arriving employee to check their actual time of arrival and thus to fix the time. It would also be natural for such an employee to make known to their supervisor that they had arrived and we accept Mrs. Lamb’s uncontradicted testimony that she reported to Mr. Baldwin. A question remaining is whether Mr. Millward was present in Mr. Baldwin’s office when Mrs. Lamb came in. Accepting Mrs. Lamb’s statement that she was in Mr. Baldwin’s office at 9:45 a.m., we note that Mr. Millward’s testimony would establish that he was in Mr. Baldwin’s office at about 9:45 a.m. and the only question put to Mr. Millward in this regard was “Did Mrs. Lamb come and speak to you while in Mr. Baldwin’s office” and Mr. Millward’s response, “I can’t recall”. We conclude that Mr. Millward was in Mr. Baldwin’s office when Mrs. Lamb came in at 9:45 a.m. and that Mr. Millward could not, therefore, have seen Mr. McBride and Mrs. Lamb together in Mrs. Lamb’s office on Mr. Millward’s way into Mr. Baldwin’s office. The first time that Mr. Millward saw Mrs. Lamb and Mr. McBride together must have been following his conversation with Mr. Young, sometime after 10:00 a.m.

23. In reply evidence, Mr. P. Herbert, Material Centre Administrator, stated that he had gone to Mr. Millward’s office a little after 9:30 a.m. November 16th and spent 10 or 12 minutes with Mr. Millard and testified that when he came into the area he saw Mr. McBride

standing in the area. Mr. Herbert states that he did not see Mrs. Lamb and that when he left Mr. Millward's office, he did not see Mr. McBride. The complainant did not have an opportunity to meet this evidence relating to Mr. McBride, and it does nothing to fix Mr. McBride's presence in Mrs. Lamb's office, although it is corroborative of the general sequencing and time frame of Mr. Millward's movements that morning.

24. It is well established that in a complaint such as this, the onus is on the respondent to come forward with a credible explanation for its action devoid of any anti-union motive. This is well expressed in the case of *The Ontario Educational Communications Authority*, [1976] OLRB Rep. Nov. 721 at para. 23 where it is said,

"The employer in a section 79 complaint which falls within the ambit of Section 79(4a) is faced with the sometimes difficult task of proving a negative. The employer must prove that it did not violate the Act and in doing so it must establish certain facts on the balance of probabilities. The Board succinctly outlined the extent of the onus in *The Barrie Examiner* case [1975] OLRB Rep. Oct 745, wherein at paragraph 17 the Board stated:

Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer establish two fundamental facts – first, that the reasons given for the discharge are the only reasons, and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

The Board further commented in *The Corporation of the City of London* case [1976] OLRB Rep. Jan. 990 that:

"Simply put, the respondent must put forward a credible explanation free from anti-union motive which is established on the balance of probabilities as the only reason or reasons which precipitated the impugned activity ..."

25. The respondent, in the instant case, relies on the inadequate job performance of Mr. McBride as demonstrated by performance reviews conducted prior to any knowledge by the respondent of union organizing activities in general or Mr. McBride's role in such activities, and also on the immediate cause for the disciplinary action being Mr. McBride's failure to follow the specific instructions set out in the November 12th letter. There is no doubt in the Board's mind that Mr. McBride has been a marginal employee and one who does not respond readily to supervisory requests to confine his behaviour within the necessary mould required of all employees. The onus which falls on the respondent, however, is to prove on the balance of probabilities that the suspension of Mr. McBride was not in any way related to Mr. McBride's union activities. The question for the Board to determine is whether, under all the surrounding circumstances, the disciplinary suspension was motivated solely by Mr. McBride's breach of the November 12th instruction or whether it was motivated in any degree by his union activities.

26. It was Mr. Young's complaint to Mr. Legget to the effect that he didn't want Mr.

McBride in his area which was the immediate cause of the disciplinary action. It is clear that neither Mr. Young nor Mr. Millward at the time of moving into the Lamb-McBride conversation had in mind a possible breach of the November 12th instruction. Mr. Millward makes clear that Mr. Young's instruction to him was to investigate why Mrs. Lamb and Mr. McBride were together. The action initiated by Mr. Young and implemented by Mr. Willward was for the purpose of enforcing a company directive that union business should be conducted off premises and not on company time. The evidence of both Mrs. Lamb and Mr. Millward indicates that the thrust of Mr. Millward's conversation with Mrs. Lamb was to emphasize his interest in the topic of discussion between Mrs. Lamb and Mr. McBride, and to make the point that Mrs. Lamb was unwise to be seen in Mr. McBride's company because it inevitably led to the conclusion that they were discussing union business. The question of Mr. McBride disrupting the work of the Purchasing Department received only minor emphasis in that conversation. It must also be noted that the practice of Mr. McBride and Mrs. Lamb spending their coffee breaks together in Mrs. Lamb's office was one of some standing and which, up to this point in time, was in itself perfectly acceptable to Mr. Millward, and indeed has continued to be acceptable subsequently. In view of all the evidence, the Board concludes that it was not until the meeting of Messrs. Young, Legget and Millward that the attention of the respondent was directed to a possible breach of Mr. McBride of the November 12th directive, and the Board has found as a fact that on November 16th, Mr. McBride was present in Mrs. Lamb's office while within the time allotted to him for coffee break.

27. The employer has a legitimate right to insist that his operations not be interfered with through the unauthorized conduct of union business during normal working hours. The regulation of topics of conversation which employees may engage in during lunch and/or coffee breaks is both impossible and undesirable of enforcement, and in any event of no impact on the employer's operations. It is clear, in our view, that the respondent in disciplining Mr. McBride was motivated, at least in part, by its desire to prevent Mr. McBride and Mrs. Lamb coming together at permissible times to discuss union business. Such action constitutes interference under section 56 of the Act and is therefore in contravention of that section, and is further violative of sections 58(c) and 61 of the Act as conduct presented by those sections directed against Mr. McBride's section 3 right to participate in the lawful activities of the trade union.

28. Having regard to all the foregoing, the Board directs that Mr. McBride be compensated for wages lost as a result of his disciplinary suspension of November 19th together with interest thereon, and that the suspensions be expunged from Mr. McBride's record. The Board will remain seized of the matter in the event that the parties are unable to agree on the amount of compensation which is owed the grievor.

1207-79-U International Molders & Allied Workers Union, Complainant, v. Rehau Plastiks of Canada Limited, Respondent.

Discharge – Strike – Employer discharging grievor during lawful strike – Grievor attempting to damage company property – Whether activity lawful – No anti-union motive established

Dissent of Board Member M. J. Fenwick – Majority decision reported [1979] OLRB Rep. Nov. 1104

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick.

DECISION OF BOARD MEMBER M. J. FENWICK; May 1, 1980

1. I cannot agree with the conclusions of my colleagues.
2. Terry Riddell, the complainant, was the union's plant chairman and served on its negotiating committee which bargained with the company. He was the strike leader.
3. The company discharged him on the grounds that he attempted to damage company property during the union's legal strike early in September 1979.
4. The union complained to the board that he was discharged contrary to section 58 of *The Labour Relations Act*.
5. Company counsel contended the union did not prove anti-union animus on the part of the company when it discharged him for an alleged picket line incident. He asserted that even if the company wrongly terminated Riddell it still does not prove complainant's case that he was discharged for union activities. This is taking refuge in legal technicalities with a vengeance.
6. I do not think matters in labour relations can be put in such black and white shades. Evidence adduced at the hearing indicated there were 20 to 25 persons on the picket line. Of this number only Riddell and a union representative were charged by police for alleged picket line incidents.
7. I don't think one can divorce Riddell from his union office and his leadership in the strike. That office made him the possible target for anti-strike activity by the company.
8. I agree that technically the union was unable to prove that the company discharged Riddell because of anti-union animus. However, I don't think it is a coincidence that he was singled out for discharge. I don't doubt he was fired because he was the plant union leader.
9. I am re-inforced in this belief in reviewing testimony of witnesses called by the company. I found the evidence contradictory concerning Riddell's action on September 12, the day the alleged attempted vandalism was to have taken place.
10. The majority has hewed strictly to the letter of the law and dismissed his com-

plaint in a decision dated November 2, 1979. It is interesting to note that at a trial on November 8, 1979 the court dismissed the charges against Riddell for lack of evidence.

11. In view of the circumstances involved I would have reinstated him in his job as I firmly believe he was discharged for alleged activity in the union's legal strike.

1207-79-U International Molders & Allied Workers Union, Complaint, Rehau Plastiks of Canada Limited,, Respondent.

Discharge – Reconsideration – Strike – Grievor discharged during lawful strike – Employer relying on alleged unlawful conduct – Subsequent criminal charges dismissed – Whether grounds for reconsideration

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and M. J. Fenwick.

DECISION OF VICE-CHAIRMAN N. B. SATTERFIELD AND BOARD MEMBER C. G. BOURNE: May 23, 1980

1. Mr. Terry Riddell, the grievor on whose behalf the complainant in this matter filed a complaint under section 79 of The Labour Relations Act, has asked the Board to reconsider its majority decision which issued November 2, 1979. The complainant alleged that Riddell had been dismissed by the respondent contrary to section 58 of the Act. A majority of the Board found that the respondent had dismissed him for the reasons stated to him at the time of dismissal and not out of any anti-union sentiment or for having engaged in union activity. The reason advanced by the respondent for Riddell's dismissal was as stated in its letter to him notifying him of the dismissal:

“This is to advise you that your services are being terminated effective today due to your illegal activities in attempting to damage Company property, for which you were arrested by the Police yesterday evening.”

2. It is this reason for discharge which appears to be at the root of Riddell's request for reconsideration for his letter reads in part as follows:

“I was fired by the Company for attempted vandalism although the case was dismissed by Magistrate P. Baker because of lack of evidence on November 8th.,/79.

I must ask the Board if I was not fired for union activity, why was I fired? It can't be for alleged vandalism since a provincial court of law would not hand down a decision because of *lack of evidence*.

It should be noted by the Board that I was not convicted of any crime

yet my Record of Employment states I was fired for attempted vandalism. This does not seem fair to me. I feel any mention of attempted vandalism should be removed from my Record of Employment and ordered so by the Board."

There are two obvious elements to his request for reconsideration. The first is his concern that the provincial court dismissed for lack of evidence charges against him which had been based on the events involving Riddell described in paragraph 3 of the Board's decision and, of course, the same events on which the respondent's reason for discharge were based. The inference to be drawn from Riddell's letter is that the Board has erred in accepting these as the respondent's reason (and the only reason) for dismissing him. The second element of his concern is with what may be registered on his record of employment with the respondent as to the reason for his termination of employment and the possible effect of that record on his chances of employment elsewhere.

3. Riddell's perception that the Board has erred is not an unreasonable one from his point of view. But it would appear to be based on a misunderstanding of the different purposes for which the Board and the courts were considering evidence about the same event and the different standards applied to the evidence. The question before the Board arising from the complainant's allegations was whether the respondent had violated section 58 of the Act. In these circumstances section 79(4a) of the Act places the responsibility on the respondent to prove that he did not violate the Act. In turn this requires the respondent to satisfy the Board that the reasons advanced for the discharge are the only reasons *and* that these reasons are not tainted by anti-union sentiment. The Board dealt quite fully with the implications of this requirement in paragraphs 5 through 8 of its decision and it serves no purpose to repeat them here. Paragraph 7 in particular deals with what might have been the result if the respondent had based its decision on wrong information; while paragraph 8 refers to the complainant's responsibility to bring forward evidence to establish the presence of anti-union sentiment in circumstances where the respondent's explanation is devoid of any evidence of its existence. In the case at hand the complainant did not call any evidence, relying solely on the respondent's evidence.

4. The issue before the court, on the other hand, was whether Riddell was guilty of the charge laid by the police. For the court to find Riddell guilty it would have to have been satisfied beyond a reasonable doubt that he had committed the offence with which he was charged. In other words, the court was looking at the evidence for a different purpose than this Board. According to Riddell, the court dismissed the criminal charges. For purposes of illustrating the difference in the issue before the court and this Board, assume the court had found Riddell guilty before the Board heard this complaint and the court's finding of guilt was in evidence before the Board as the reason for Riddell's discharge. If there co-existed with that reason a reason based on his union activity or an anti-union sentiment on the part of the respondent, that would constitute a violation of the Act in spite of the fact that he had been found guilty of the criminal charge in which event the Board would have directed that he be reinstated in employment.

5. The Board's broad discretion to reconsider its decision, which flows from section 95(1) of the Act, are very cautiously exercised because of the widely recognized need for finality. Generally the Board will not reconsider a decision unless the party seeking it:

- (a) has new evidence to bring, which it would not have obtained before by exercising reasonable diligence and which, if accepted, would be practically conclusive of the issue; or
- (b) wishes to make representations or objections not already considered by the Board.

Having regard to the fact that the complaint did not call any evidence in the hearing and there is nothing in Riddell's letter to suggest that he has evidence of the sort referred to in item (a), the first condition is not met. The only reference in the letter which suggests the second ground is that of the court's verdict. In the Board's view, paragraph 7 of the decision dealt with the effect of Riddell not being responsible for the conduct alleged against him by the respondent. Thus, the Board has, in effect, considered that representation.

6. In light of the foregoing, the Board is of the opinion that it should not reconsider, vary or revoke its decision of November 2, 1979 and Riddell's request is therefore denied.

7. The second element of his request is not a matter coming within the scope of the Board's authority in respect of the original complaint and therefore is not a proper matter on which to decide the question of whether reconsideration should be granted. However, if the second element of his concern has substance in fact (and the Board makes no presumption either way) and is founded on an unfair labour practice of an employer or person, it could provide the basis for a new complaint under the Act. If, however, his concern is based on some other alleged wrong not falling under the Act, then Riddell would have to look to the courts in a civil suit should he believe he had grounds to do so.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I dissent from the decision of the majority. I think Terry Riddell should have his complaint that he was discharged for union activities, which the majority dismissed last November, reconsidered in the light of new information he provides.

2. The employer discharged Riddell on police information that he was charged with attempting to damage company property during a picket line incident on September 12, 1979.

3. Riddell now writes the board the police charge against him was dismissed by the court for lack of evidence. He rightly asks: "I must ask the board if I was not fired for union activity, why was I fired?"

4. In view of this development I believe Riddell deserves another day in court, as it were. I would grant reconsideration of his case.

0870-79-M A council of Trade Unions acting as agent for Teamsters Local 230 and L.I.U.N.A. Local 183, Applicant, v. Metropolitan Toronto Road Builders Association and **Repac Construction & Materials Ltd.**, Respondents.

Arbitration – Discipline – Union steward actively promoting slow-down – Duty owing by steward considered

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and D. B. Archer.

APPEARANCES: *Douglas Wray, Isaac Raymond and Joe Luciano for the applicant; S. C. Bernardo for the respondents and Dennis Forsyth for Repac Construction & Materials Ltd.*

DECISION OF VICE-CHAIRMAN N. B. SATTERFIELD AND BOARD MEMBER J. A. RONSON; May 15, 1980

1. The applicant has referred to the Board a grievance in the construction industry for arbitration under section 112a of The Labour Relations Act. The applicant, acting on behalf of the Teamsters Local 230 (“Local 230”) and its member Joe Luciano, alleges that the respondent employer Repac Construction & Materials Ltd. (“Repac”), without reasonable cause suspended Luciano without pay for 10 shifts (i.e. two weeks). The applicant seeks to have the suspension rescinded without loss to Luciano of any wages, benefits and seniority.

2. The suspension was effective from August 8, 1979, the referral was made August 9, 1979 and was heard first on August 27, 1979. It was continued for hearing on March 11th and March 18, 1980. The evidence of all 11 witnesses was received during the first two days of hearings. The evidence of the respondent’s witnesses and that of the applicant’s witnesses contained some significant differences and contradictions. The findings of fact herein reflect the Board’s assessment of all of the evidence, the manner in which it emerged, the reliability of the witnesses’ recall of events, their demeanor and relative credibility.

3. Repac is a road building contractor which also operates gravel pits and quarries. It has a truck fleet of some 30 vehicles, four of which are referred to as mule trains and have a load capacity of approximately 50 tons each. The two most common routes on which these latter trucks are used involved round trips of 90 and 50 miles. Luciano was driving one of these rigs at the time of his suspension and at all material times prior to that event. Repac’s annual operating season runs approximately from April through November and most of its drivers are hired at the start of the season and laid off at the end. The drivers who testified, for the most part, had worked during several seasons for Repac. In June 1979, Repac was engaged in a major road contract on which it was closely monitoring the costs. In mid-June when the job was approximately half completed, the dumping of sand and gravel on the project had decreased by at least 200 tons per day. At the same time Repac got a report that Luciano’s conduct might be connected with the productivity problem. This was the beginning of a series of events which occurred at intervals between mid-June and the first of August, most of which came to Repac’s attention after the fact and which led to Luciano receiving on August 7th a letter advising him of his suspension beginning August 8th. It reads as follows:

"This is to notify you that, effective August 8, 1979, you will be suspended for a period of two (2) weeks. The suspension is for deliberately attempting to curtail production.

You have attempted, on various occasions over the past six weeks, to persuade other employees to limit production and to refuse to work over-time when requested by the Company, to the point of threatening some of these employees. Indeed, several employees have complained to the Company about your behaviour.

The Company views this very seriously and feels that your conduct warrants at least a two week suspension. Such conduct, especially during our peak season, cannot and will not be tolerated. Any recurrence will be deemed cause of dismissal.

You are, therefore, expected to report back for work on August 22, 1979."

4. Luciano was one of three Repac employees who were elected stewards of Local 230 on June 7, 1979 and he was appointed chief steward. Shortly afterward, on June 13th, he was overheard telling two other Repac drivers to keep their trucks in line which, to the company, translated into trucks travelling in a manner which would cause them to arrive at the pit or dump site in groups thus causing delays loading and unloading. Upon investigation, Luciano was observed returning to Repac's pit with three other trucks following in convoy. Without Luciano being singled out, it was indicated to the drivers that travelling in convoy was unacceptable because of the delays it created. About the same time, two of the mule train drivers complained that Luciano was interfering with their regular hauling schedule from Repac's Milton quarry by pressing them not to leave Repac's yard for the first trip of the day, or to leave restaurant stops after meals and coffee breaks, until all four drivers were ready to leave. One of the drivers complained also that Luciano was driving his truck on the road project at a speed which was causing trucks to congregate behind him. Repac determined to deal with this situation indirectly and held a meeting of its drivers, including the three stewards, and discussed the productivity problem which had developed. The output of the four mule trains continued to be unsatisfactory and this caused Repac to have a meeting on July 4th with them (Luciano included) and the business representative of Local 230. The continued unsatisfactory productivity was discussed as well as the specific problem of trucks leaving together from the yard and from stops for meals and coffee breaks, including unauthorized breakfast stops. After this meeting two of the drivers, who found the need for such a meeting to their dislike, gave the company a written statement of their complaints about Luciano's conduct. This meeting was followed on July 24th with Repac's next regular meeting with its drivers to which the Local 230 business representative was invited again. The problem of trucks travelling in convoys was addressed once more. Relative quiet reigned until July 30th when the mule train drivers asked Repac for a meeting. It is unclear from the evidence as to whether they asked that it be held without Luciano, in any event he was not present but another steward, now a mule train driver, was. At that meeting, one of the drivers asked to either have Luciano taken off driving mule trains or to be transferred himself. In the presence of the steward, this driver and another one complained of Luciano's harrasing conduct; specifically he was telling them to restrict the number of trips made during their regular daily hours and was discouraging them from passing other Repac trucks on the high-

way. Later, on August 1st, both drivers gave Repac a written statement of their complaints. One of them quit his employment a week later. While this was the day after the start of Luciano's suspension, there can be no doubt on the evidence that it was the direct consequence of the harassment the employee believed he was being subjected to by Luciano.

5. During the morning of August 7th, Dennis Forsyth, Repac's Transportation Manager, interviewed Luciano and confronted him with the complaints contained in all four statements. Luciano denied all of them. Later that day Forsyth decided to suspend Luciano for the reasons set out in the letter of suspension, called the business representative and advised him of the intended action and at the end of the shift advised Luciano of the decision and gave him the letter.

6. The Board finds as follows on the evidence of the events from mid-June until the end of July, 1979. Luciano drove his truck on the road project in a manner that caused other drivers to congregate (i.e., convoy) behind his vehicle resulting in delays in truck loading at Repac's pit and truck unloading at the dump site. Luciano caused other drivers of the mule trains to leave together from Repac's yard, to make stops at common locations for meals and coffee breaks, including unauthorized breakfast stops and to leave together from these stops, resulting in the vehicle travelling in convoy on the highway and creating delays in unloading them at dump sites. The convoying was reinforced by discouraging the drivers from passing him or other Repac drivers on the highway. This conduct was engaged in during the period in question in spite of and in the face of Repac's several instructions to the drivers that this was unacceptable performance of their jobs and was curtailing productivity. Finally, Luciano attempted to persuade other mule train drivers to either reduce the number of daily loads executed or to take more time to execute the same number of daily loads.

7. The relevant clauses of the collective agreement provide as follows:

"ARTICLE IV – MANAGEMENT RIGHTS

4.01 The Council agrees that it is the exclusive function of each member company:

- (a) To conduct its business in all respects in accordance with its commitments and responsibilities, including the right to manage the jobs, locate, extend, curtail or cease operations, to determine the number of men required at any or all operations, to determine the kinds and locations of machines, tools and equipment to be used and the schedules of production, to judge the qualifications of the employees and to maintain order, discipline and efficiency;
- (b) To hire, discharge, classify, transfer, promote, demote, lay off, suspend or otherwise discipline employees, provided that a claim by an employee that he has been discharged, suspended, disciplined or disciplinary demoted without reasonable cause shall be subject to the provisions of the Grievance Procedure;
- (c) To make, alter from time to time, and enforce reasonable rules of conduct and procedure to be observed by the employees;

- (d) It is agreed that these functions shall not be exercised in a manner inconsistent with the express provisions of this Agreement.

ARTICLE X – PRODUCTIVITY

10.02 During the lifetime of this agreement, the Council and its affiliated unions agree that there will be no strike, slowdown or picketing or any other act which will interfere with the regular schedule of work, and the Association and its member companies agree that there will be no lockout. The company shall have the right to discharge or otherwise discipline employees who take part in or instigate any strike, picketing or slowdown or any other act which interferes with the regular schedule of work.”

8. Having regard to the facts herein, the Board finds that Luciano has engaged in conduct which has interfered with the regular schedule of work of Repac’s truck drivers who drive the mule train and truck drivers who were engaged on the major road contract referred to in paragraph 3 herein thus causing a curtailment of their work. The Board finds further that Luciano attempted to persuade other mule train drivers to restrict their daily work output contrary to the provisions of the collective agreement. As another consequence of his conduct the other mule train drivers became seriously demoralized resulting in further disruption of their work and causing one to be transferred from this work and another one to quit. It is necessary, therefore, for the Board to determine if, in all the circumstances of this case, Luciano’s conduct was reasonable cause for discipline and, if so, was a two-week suspension justified.

9. Part of applicant counsel’s argument that not only was two-weeks suspension unwarranted but that no discipline was warranted in the circumstances of the case was based on Repac’s failure to confront Luciano directly with the complaints as they came to its attention or to discipline him at the time (and Repac makes no claim that it did either). Counsel asked the Board to conclude from Repac’s action that it either:

- (a) did not consider the incidents complained of in mid-June to be serious enough to require discipline or direct confrontation of Luciano; or
- (b) it purposely deferred taking action in order to allow events to accumulate so that it would have a case for more severe discipline;
- (c) by so doing, it would not be unreasonable for Luciano to believe that Repac was condoning his conduct; and that
- (d) Repac should not be able to discipline Luciano, or, at least, that the discipline applied was too severe.

The Board does not accept that argument as support for either no discipline at all or for lesser discipline. When Repac became aware of the possibility that Luciano’s conduct may be connected to a lowering of the truck drivers’ productivity, it called a meeting of all drivers to discuss the productivity problem. When productivity of the mule trains did not improve, Repac called a meeting of those drivers (including Luciano) and obtained the attendance of

Local 230's business representative. It followed up that action by inviting the business representative to attend the regular meeting of all drivers held on July 24th when Repac addressed again the problem of productivity. It is correct to say that on none of these occasions did Repac single out Luciano's conduct as being a cause of or contributing factor to the productivity problem. It is equally correct to say that Repac realized that it was dealing with an employee who, very recently, had been elected by its employees to represent their interests under the collective agreement and that its perception, right or wrong, was that the authority of Luciano and the other stewards might have a beneficial impact on the recognition of employees for their individual responsibility for maintaining acceptable productivity. It is evident also from Repac's subsequent actions that it was sensitive to what it reviewed as the potential for the problem to be escalated into some more overt form of action. The seriousness with which it saw the consequences of Luciano's conduct is evident in the fact that Repac sought and obtained the business representative's attendance at the meeting on July 4th and July 24th. Furthermore, Luciano was present at the meetings of all drivers in mid-June and on July 24th as well as the July 4th meeting with the mule train drivers. Having regard to the subject matter of those meetings and the Board's findings of fact in respect of Luciano's conduct, Luciano had to be aware of the results of his conduct. Finally, four of Repac's truck drivers considered Luciano's conduct serious enough to make written statements to Repac about a fellow driver who is also their chief steward.

10. Having regard to the foregoing circumstances the Board finds it not credible that Luciano both as an individual truck driver and as chief steward, would not realize that his conduct was patently unacceptable and subject to severe discipline. Having regard further to the interference with the regular schedule of work of the truck drivers, the curtailment of their production, the attempt to persuade the mule train drivers to restrict their daily work output and the disruption of the mule train drivers caused by his conduct, the Board finds, in all of the circumstances, that Repac had reasonable cause to discipline Luciano. Having regard to these same facts and circumstances, including the fact that he was at all material times chief steward of the truck drivers at Repac, the Board finds that the discipline applied is justified. Luciano's conduct constitutes serious interference with Repac's exclusive function preserved by clause 4.01(a) of the collective agreement "... to maintain order, discipline and efficiency", especially when account is had for the nature of Repac's work and the fact that the drivers' work is not capable of close supervision ranging, as it does, over a relatively widespread area as compared with being contained within the more confined space of a production activity.

11. In referring to Luciano's position of chief steward, the Board is cognizant of the fact, in recent years, a schism has developed in arbitration decisions as to the disciplinary liability of union stewards who engage in disciplinable conduct which impacts on the rights and obligations of other employees, particularly be becoming involved in unlawful strikes. Decisions on both sides of the schism have been reviewed in the courts and the leading judgements as well as leading arbitral decisions supporting both sides of the issue were analyzed in *Re Canadian Industries Limited and United Steel Workers of America* (1977) (Burkett), an unreported decision issued January 27, 1977. In that case, the arbitrator was dealing with a situation where two union stewards who had been involved in an unlawful strike had received more severe discipline than other employees for similar involvement and, having analyzed the arbitral decisions and court judgements, the arbitrator first concluded that the courts support the proposition that stewards are in a different position from other employees in cases of breach of a collective agreement because of their recognized position of lead-

ership (as indicated from the proposition that a union steward by virtue of his office owes a higher duty to this employer than do other employees). The arbitrator further concluded that the courts have established certain general principles and the arbitrator states these in the following terms:

“Whereas the reported arbitration decisions have been at variance with one another the recent pronouncements of the Courts have established general principles which should be followed by Board of Arbitration in dealing with the reasonableness of discipline imposed upon employees who hold union office. These general principles can be stated as follows:

- (a) Absent an express provision in the collective agreement an employee who holds union office does not have a special duty to the employer and cannot therefore be disciplined for his failure to enforce the terms of the collective agreement. His failure to act leaves the trade union, on whose behalf he acts, liable to damages but it does not leave the individual liable to discipline.
- (b) ‘... a union officer, because of his greater knowledge and higher degree of responsibility may invite a greater penalty for the same conduct than would rank and file employee.’ In an unlawful strike this greater liability results from the fact that a union official by actively engaging in the unlawful strike is encouraging the strike to a greater degree because of his recognized leadership. [See *Canadian General Tower Ltd. and United Canadian General Tower Ltd. and United Rubber Workers Local 862C2 (1975) 8 LAC (2d) 381 (Weatherill) and Domtar Packaging Company Limited and Local 595 I.C.W.U. dated March 3, 1976, as yet unreported, (Rayner)】”.*

If a rank and file truck driver had conducted himself in the same manner as Luciano, it would warrant, in the Board’s view, severe discipline. Having regard to the principle enunciated in the first sentence of item (b) above, the Board finds Luciano’s discipline not to be unduly severe in all of the circumstances herein.

12. The Board finds no sound or judicious reason to exercise its authority to substitute a lesser penalty in all the circumstances of this case.

13. The grievance is dismissed.

DECISION OF BOARD MEMBER D. B. ARCHER:

1. I agree with the facts as set out in the majority decision. However the facts as stated and the contradiction of those facts do not drive me to the conclusion arrived at by the majority in paragraph 6 of its finding.

2. As stated in the majority decision, to determine when an employee who is also a union steward is over-zealous or is usurping functions that belong exclusively or otherwise to the company as outlined in the collective agreement, is a difficult task. In arriving at a

conclusion I would have given more weight to Luciano's position as shop steward and his seemingly over-zealous attitude and subjected him to a written warning which I believe was all the disciplinary action that was needed at that time. I realize there is an abundance of literature on the duties and responsibilities re discipline of a union steward. The union steward is in a very vulnerable position, he must process grievances, advise his membership and generally police the agreement on behalf of its constituents. This sometimes makes him or her unpopular with management.

3. Luciano was, in my opinion carrying out what he believed was his responsibility to his fellow union members. As I have personally stated I would have substituted a warning which would have brought the matter to the attention of senior union officials where a solution could have been found or a final decision arrived at.

0062-80-U Office and Professional Employees International Union,
Complainant, v. **Retail Clerks Union, Local 206**, Chartered by the United
Food and Commercial Workers International Union, Respondent.

Change in Working Conditions – Union as employer directing issuance of withdrawal cards to business agents organized by applicant – Whether violation of freeze

BEFORE: George W. Adams, Chairman and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Janice Best, Leslie W. Dowling, and Ronald W. Springall for the complainant; Alick Ryder, Q.C. and Charles McCormick for the respondent.*

DECISION OF THE BOARD; May 28, 1980

1. This is a complaint under section 79 of *The Labour Relations Act* complaining that the grievors have been dealt with contrary to the provisions of section 70 of the said Act.

2. The grievors are representatives of the respondent trade union and are members of bargaining unit for which the complainant was certified March 21, 1980.

3. They complain that the respondent, through its President, Charles McCormick, improperly terminated their active memberships in the respondent trade union contrary to section 70. Section 70(1) provides:

“Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,as the case may be; or
- (b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.”

4. By letter dated April 1, 1980, Charles McCormick wrote to each grievor enclosing a “Withdrawal Card” issued by Local 206 purportedly “in accordance with the Bylaws of the Local and International Constitution.” A withdrawal card has the following form:

**STUBS ARE NOT TO BE DETACHED
WITHDRAWAL CARD**

Exact date card was dated

19

Local No. _____

Issued to _____

State new occupation

► This Stub Must Be Filled Out and Retained by the Local

**UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION**



**UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION**

I, _____
hereby accept this Withdrawal Card which is issued to me by

Local No. _____ of _____

under the provisions of Article 6 of the International Constitution. I further agree to abide by all the requirements concerning Withdrawal Cards set forth in the Constitution and laws of the International Union.

(Signature)

We hereunto affix our signatures and the seal of our Local this 1st day
of _____, 19

President

Secretary-Treasurer

NOTE RULES ON REVERSE SIDE OF THIS CARD ▼

**LOCAL
SEAL**

RULES

A. Persons holding withdrawal cards may maintain continuous membership:

1. By depositing the withdrawal card with the International Union no later than the first day of the month following the date of issuance, along with one month's dues, and becoming a general member as provided in Article 4(F) of the International Constitution, or
2. If eligible for active membership, by depositing the withdrawal card with the Local Union within whose jurisdiction such person is employed or last held membership within one calendar month from the date of its issuance, together with the payment of the current dues.

B. Any person possessing a valid withdrawal card shall be accepted as a reinstated member, without the payment of a fee, except the current dues, provided the card is deposited with the Local Union within whose jurisdiction such person is employed within thirty days from the date of employment within a collective bargaining unit represented by the Union, or within thirty days from the date of employment by the Union as provided in Article 6 of the International Constitution.

C. Any person on withdrawal, who is employed within a collective bargaining unit represented by the Union, who fails to apply for reinstatement as prescribed in Subsection 6(D) shall have his or her withdrawal card declared void and shall not be reinstated to membership without the payment of the applicable reinstatement fee.

D. Any person on withdrawal who engages in conduct in violation of the International Constitution may have his or her withdrawal card cancelled pursuant to Article 6(I) of the International Constitution.

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5. The article of the trade union's constitution said to authorize the unilateral issuance of withdrawal cards by the respondent union is Article 6(A) which provides:

“Withdrawal, Transfer, and Military Leave Courtesy Cards

(A) The following members whose current dues and fees have been paid shall be entitled to withdrawal cards without charge therefor:

1. Members who become employers;

2. Members no longer employed within a collective bargaining unit represented by and within the jurisdiction of the Local Union;
3. Members whose positions excluded from coverage by a collective bargaining agreement;
4. Members who are employed by the International Union or any of its chartered bodies who are represented by another labor organization for purposes of collective bargaining with the International Union or any of its chartered bodies; and
5. Members no longer employed by an employer who is the subject of an active organizing effort by the International Union or any of its chartered bodies and who is not a party to a collective bargaining agreement with the International Union or any of its chartered bodies.”

6. The evidence indicates that the grievors had to become members of the respondent union in order to be hired into the positions they currently hold. None of the grievors requested the issuance of withdrawal cards. As of the date of the hearing of this matter, none of the employees in the office and clerical bargaining unit for whom the complainant trade union has been recently certified have been issued withdrawal cards. Representatives in Montreal who bargain collectively with Local 500 of the same international trade union continue to be members of Local 500. In addition, there are two members of the respondent local trade union who bargain collectively with the international trade union with whom they are employed. They have continued to be members of the local trade union. Finally, the evidence indicates that when a member becomes a representative of management in a company with whom the respondent bargains, the member is automatically issued a withdrawal card.

7. Having regard to the submissions of the parties and the evidence as stipulated before us, we have concluded that the respondent trade union violated section 70 of *The Labour Relations Act* by altering a right, privilege or term of employment of the grievors without the consent of the complainant trade union. We are not satisfied that the issuance of the withdrawal cards can be analogized to a wage improvement program pre-existing the arrival of a trade union as has been the case in a number of decisions rendered by the Board under section 70. On the evidence, we are not satisfied that the action of the respondent is demanded by either the express words of the constitution or the past practice in applying the constitution to similar situations.

8. For all of these reasons, the grievors are reinstated into the active membership of the respondent trade union and the withdrawal cards are rescinded. The respondent trade union is directed to make the appropriate changes in its records to rectify the violation so found.

1117-79-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. Simmons Limited, Respondent.

Employee – Whether supervisors of small office group excluded by section 1(3)(b)

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Art Jenkyn and Ralph Currie for the applicant; G. Grossman and H. Mustard for the respondent.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; May 23, 1980

1. This is the continuation of an application for certification. The parties were in dispute as to whether persons in certain classifications were “employees” within the meaning of *The Labour Relations Act*, and accordingly, a Labour Relations Officer was appointed to inquire into the duties and responsibilities of these persons. The persons in dispute were the Secretary to the General Manager and those persons whom the respondent has classified as “supervisors”, being the Order Desk Supervisor, the Accounts Payable Supervisor, the Invoicing Supervisor, and the Plant Loading Supervisor. The bargaining unit consists of some twenty persons in addition to those in dispute.

2. Mrs. Bertha Trimper, Secretary to the General Manager, handles the correspondence for the Assistant General Manager as well. There is no separate secretary to perform that function. Mrs. Trimper accordingly opens files and types all correspondence for both managers, including any marked “confidential”. She has a filing cabinet, kept under lock and key, which contains various items relating to labour relations, and which would clearly be confidential, including Minutes of management meetings and correspondence relating to budgetary and grievance settlement proposals. The evidence and exhibits filed further demonstrate a wide range of items which Mrs. Trimper either types or receives on behalf of the General Manager while those items are still in the “formative” stages, and before they have been finally approved for release to the applicant or other employees. These items include such matters as a handbook of employee rules, and the company’s position on the extent to which it would absorb premium increases which occurred with respect to both OHIP and other forms of insurance. Based on the foregoing, the Board is satisfied of the witness’ regular involvement in confidential matters pertaining to labour relations, and accordingly finds that the Secretary to the General Manager is excluded from the bargaining unit by virtue of section 1(3)(b) of *The Labour Relations Act*.

3. The question of the supervisors is considerably more difficult for the Board. In this case, each supervisor has a very limited number of employees “reporting” to her, and the Board must be circumspect in dealing with an alleged diffusion of managerial authority which is so extensive as to seriously erode the very composition of the bargaining unit. On the other hand, the Board takes note of the fact in the present case that the manner of assigning responsibility in the respondent’s office was not conceived in the shadow of the applicant’s organizing campaign, but rather has been in place (including the designation of “supervisor”) for a considerable period of time. (See the examination of Mrs. Florence, at page 32.) The evidence further demonstrates that while these supervisory groups are small,

the responsibility of the supervisors and their input into various elements of personnel decision-making are real.

4. Mrs. Nina Florence is the Order Desk Supervisor and reports to the Sales Manager. She has three people under her direction and control. As a result of a procedure instituted a year ago, she does written evaluations of her staff, for the purposes of their merit review. She also makes an assessment on probationary employees, in particular as to whether they should be retained or let go. Any discharges in her department are as a result of a joint discussion between herself and the Office Manager. In terms of her recommendations in general, Mrs. Florence indicates that the majority of them are acted upon by management. She initiates discussions with her staff on her own when she feels that their work requires improvement, although she has never had occasion to issue or recommend any formal type of discipline, beyond the type of "reprimand" just mentioned. On one occasion she, "in effect", vetoed a proposed transfer of an employee out of her department and on another recommended the manner in which a vacancy in her department was ultimately filled. It is clear that she does no hiring or firing directly. Mrs. Florence does not perform the same work as the other staff in her department, but rather spends three-quarters of her time correcting the work that comes into the department from elsewhere in the office before distributing it to her staff. The contact between the Office Manager and the Order Desk Department is normally through Mrs. Florence.

5. Helen Bugeja is the individual classified by the respondent as Accounts Payable Supervisor. She is responsible to the Office Manager (Controller) and has, according to her testimony, three other employees under her direction and control. She indicated that she feels that she is responsible for the quality and quantity of the work done by these employees. She is looked to by the Office Manager to make an oral assessment of employees in her department during their probationary period, and again two or three times each year. Mrs. Bugeja's feeling is that her recommendations would generally be followed in this regard. Mrs. Bugeja, on her own initiative, corrects the other employees' work performance, for example, on matters such as tardiness. It appears that Mrs. Bugeja also on her own permits employees to take work home and complete it on an overtime basis, although formal approval for the payment of overtime actually rests with the Office Manager. If the job at home appears to take more time than Mrs. Bugeja would have expected, she would question the employee about it (although she would not deny the overtime pay). As with Mrs. Florence, her recommendations have been accepted as to the manner in which vacancies in her department have been filled. Mrs. Bugeja and the Office Manager have sole access to an "office personnel file" which is kept under lock and key, but it is not clear to what extent that file contains information which would be confidential in the context of a collective bargaining situation. According to the witness, she and the Office Manager work very closely together, and she is asked, regularly it would appear, to give her opinion of the other employees. She has recommended salary increases for other employees on a number of occasions, and the inference from the evidence is that these recommendations were acted upon. Mrs. Bugeja acts as the Company contact with the insurance carrier for employees who have complaints about their benefits, but the extent of her discretion in this regard was not developed.

6. Ms. Valerie Trotter is the person classified as Invoicing Supervisor. She also reports to the Office Manager. She states she had two other employees under her direction and control, and is responsible for the quality and quantity of their work. Ms. Trotter evalu-

ates new employees coming into her department, and her recommendations have been accepted. She recommends overtime when she feels it is necessary, and her recommendations are accepted. Like the other supervisors examined, she has had effective input into the manner in which vacancies in her department are filled, and she is called upon to make an assessment of new employees. Within the past year-and-a-half she has also recommended that an employee be terminated and another be transferred out of her department, and both recommendations were acted upon immediately. She testified that it is “just taken for granted” that she has the authority to make those kinds of recommendations. She also indicated that she “acts on behalf of management” in discussing complaints which employees may have, but it appears that that reference is limited to complaints about the workload of the department, which would be the normal responsibility of a group leader. As with Mrs. Florence and Mrs. Bugeja, Ms. Trotter receives a bonus at Christmas different from the other employees in her department.

7. Ms. Janet Cuss is the individual classified as Plant Loading Supervisor, and reports to the Distribution Manager. Her responsibility generally is to maintain the cardex or orders, production and shipment, and to attempt to balance inventory and orders for production purposes. Ms. Cuss denies that she is a “supervisor”, but agrees that she has two other employees for whose work she is responsible, and states that “if it’s wrong, it comes back on me”. She has been monitoring the work performance of one of the employees in her department, with whom she has been having difficulties. As the witness testified, “we’re trying to sort her out”. Ms. Cuss drafted a warning to the employee to the effect of “either shape up or ship out”, and the letter went to the employee under the Distribution Manager’s signature. Ms. Cuss indicated that her recommendations are “pretty well” adopted, but also made it clear in this particular case that she had recommended terminating the employee much earlier, but that the Company had decided to be more patient. Ms. Cuss works overtime on her own when she feels it is necessary, although it appears she has no input into the decision whether other employees in her department work overtime. Counsel for the respondent emphasized the sensitive nature of the information that Ms. Cuss has available to her. The respondent does not, however, appear to have treated the information in that manner in the past, and the Board attaches little weight to this aspect of Ms. Cuss’ responsibilities. Ms. Cuss does indicate, however, that if there is a problem with the work performance in her department, it is her concern more than anyone else’s in the department. She is aware that she received a salary increase at the time that she was recently accepted for this job, but, unlike the other supervisors, she is not aware that the bonus she receives at Christmas is different from the other employees’ in the department.

8. The above represents the highlights of the supervisor’s responsibilities. There can be little doubt on the evidence that it is not the supervisors who ultimately “call the shots” in their department. In almost every respect, the ultimate authority and power to make decisions lie with the supervisor’s superior. The supervisors play only a limited consultative role in the granting of time off, and while their input on overtime varies, it is clear that only their superior can formally approve it. They have no authority to implement formal discipline and certainly no authority to hire or fire on their own. They have, however, historically been the “first-line supervisors” in the respondent’s scheme of organization, and it is the Board’s task to determine whether their responsibilities and authority place them more nearly in the position of the traditional “foreman”, or in that part of “lead hand” or “group leader”. Independent decision-making authority is clearly lacking in the present group of supervisors, but such authority has not been the test applied by the Board in determining the status of first-

line supervisors. Rather, because of the direct and substantial impact which their input may have upon the working conditions or continued employment of persons under their control, the test has been one of "effective recommendation". This distinction was drawn very carefully by the Board in the *Inglis Limited* case, [1976] OLRB Rep. June 273, and the Board noted at paragraph 9 of that decision:

"The Board has seen fit to apply the test of effective recommendation to persons engaged in the supervision of others . . . because a person engaged in supervision who makes effective recommendations as regards terms and conditions of employment would be compromised if placed within a bargaining unit of other employees."

In the present case, the test of effective recommendation appears to have been met, notwithstanding the small numbers in each supervisory unit. The supervisors make recommendations on a regular basis on such matters as the retention of employees within their department (for both probationary employees and beyond), the manner of filling vacancies, and the granting of merit increases, and these recommendations, from the incumbents' own evidence, are generally accepted. The difficulty in drawing a firm conclusion in this case is illustrated by the evidence of Ms. Cuss that her recommendation to terminate a particular employee was essentially rejected. The test stated in *Inglis Limited*, however, as well as in *McIntyre Porcupine*, [1975] OLRB Rep. April 261, is that the recommendation is *usually* acted upon, and the Board finds that this one incident recounted by Ms. Cuss is overridden by the evidence of the supervisors viewed as a whole, including that of Ms. Cuss.

9. In addition, the Board finds that the degree of responsibility for the work performance of others both demanded by the respondent and acknowledged by the supervisors, together with the initiative which the supervisors are shown to have taken in matters of corrective or "informal" discipline, distinguishes the persons in dispute from the "group leaders" or "lead hands" found in other contexts. In all the circumstances, the Board concludes that the present supervisors perform a role more nearly akin to that of "foremen" than of "lead hands". Accordingly, the Board finds that the Order Desk Supervisor, the Accounts Payable Supervisor, the Invoicing Supervisor and the Plant Loading Supervisor are not "employees" within the meaning of *The Labour Relations Act*, and are excluded from the bargaining unit of the applicant.

10. At the meeting with the Labour Relations Officer, it was agreed by the parties that the Personnel Clerk, Sales Clerk and Order Desk Clerk are included in the bargaining unit, and that the Credit Manager, Personnel Assistant, Engineering & Technical Staff and Sales Trainee are excluded. The Board therefore certifies the applicant as bargaining agent for all office and clerical employees of the respondent in the City of Brampton, Ontario, save and except supervisors, persons above the rank of supervisors, professional engineers, sales persons, Credit Manager, Personnel Assistant, Engineering & Technical Staff, Sales Trainee and the Secretary to the General Manager.

11. For the purpose of clarity, the Board notes that the term "supervisor" includes the Order Desk Supervisor, the Account Payable Supervisor, the Invoicing Supervisor and the Plant Loading Supervisor.

12. A formal certificate will now issue to the applicant.

DECISION OF BOARD MEMBER, W. F. RUTHERFORD:

1. I dissent from the decision of the majority.
2. I do not disagree with the majority decision regarding Mrs. Bertha Trimper and accept the position that she works in a confidential capacity that would exclude her from union membership.
3. Regarding the other four – Mrs. Nina Florence, Helen Bugeja, Valerie Trotter and Janet Cuss – I disagree that these employees are in such a confidential or managerial capacity that it would restrict their rights to union membership under the Act.
4. In a small office group it does not appear to have any logic that every two or three employees need a supervisor. In fact where employees work closely with management, any employee can make recommendations on a fellow employee's work habits that could be acted upon by management.
5. The four employees above, in my opinion, act more in the lead hand or group leader capacity and should be allowed to join the union of their choice.

1255-79-R; 1262-79-U Canadian Chemical Workers Union, Complainant, v. **Somerville Belkin Industries Limited** – Brockville Packaging Division, Thomas Frey, Respondents.

Certification – Charges – Interference in the Trade Union – Section 79 – Employee obtaining permission to address entire plant during organizing campaign – Suggesting loss of work and plant closure if union successful – Whether employee violating act – Whether acting on behalf of employer – Whether section 7a applicable

BEFORE: E. Norris Davis, Vice-chairman, and Board Members M. J. Fenwick and R. D. Joyce.

APPEARANCES: *Daniel Ublansky for the applicant/complainant; B. R. Baldwin and T. E. White for the respondent (Somerville Belkin Industries Limited – Brockville Packaging Division); James A. Ballard for the respondent (Thomas Frey) and for the objectors.*

DECISION OF E. N. DAVIS, VICE-CHAIRMAN AND BOARD MEMBER R. D. JOYCE;
May 28, 1980.

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2. File No. 1255-79-R is an application for certification in which the applicant seeks to have the Board exercise its discretion under section 7a of The Labour Relations Act; file 1260-79-U is a complaint filed under section 79 of the Act in which the union alleged contraventions of sections 56, 58(c) and 61 by the respondent. Upon the agreement of the parties the two files are consolidated.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

4. In respect to the bargaining unit claimed by the applicant the parties are in dispute as to the inclusion or exclusion from the unit of persons regularly employed for twenty-four hours per week or less and students employed during the school vacation period. The respondent concedes that there has been no history of employment of such classes of persons in this operation and the Board, in accordance with its usual practice will not make the requested exclusion. The Board finds that all employees of the respondent in Brockville, save and except foremen, those above the rank of foreman, office and clerical employees, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The respondent filed lists of employees with the Board indicating there to be 148 persons in the bargaining unit, and the applicant filed applications of membership on behalf of 7 such persons. Upon the agreement of all parties, the Board ruled it to be unnecessary to hear evidence as to the origination and circulation of the petition filed by the group of objectors inasmuch as the petition would not be relevant to the applicant's right to certification.

6. The respondent's Brockville operation was established some three years ago and principally is engaged in manufacture of tobacco packaging. The tobacco capacity had previously been located in the respondent's Montreal operation. The move from Montreal was motivated by the respondent's desire to not make further capital investment in Montreal because it had been virtually out of business between 6 and 12 months as a result of labour disputes, and by pressure from customers to make facilities available elsewhere in order to provide enhanced security of delivery.

7. Mr. T. White, the respondent's Vice-President Personnel and Industrial Relations, testified that for a number of years prior to the advent of the Brockville plant the respondent had been examining avenues for structuring employer-employee relations for improvement, and concluded that an "open concept" was the best vehicle. This concept was defined as treating people as adults, not putting too many restrictions on them, paying employees on a salaried basis without deduction for time off, and for the company to set wage and benefit levels as good as any place in the company. White stated that the Brockville plant had been set up in conformity to that concept. White, in answer to the question as to whether employment applicants were screened for pro- or anti-union attitudes, responded, "no, we want the best people and it is obvious that they would come from union shops".

8. Mr. Robt. Stewart, Executive Director of the applicant, testified that in early September 1979 he made the decision to initiate an organizing campaign at Brockville. Mr. Wm. Bost, a national representative of the applicant who was stationed in Brockville was assigned to head up the campaign along with one other full-time employee of the applicant's, and two employees, normally employed in the respondent's London, Ontario, operations, who secured a leave of absence for this purpose. The campaign was launched on September 17, 1979.

9. According to Bost the organizing team started Monday, September 17th, getting oriented to the area and making phone and house calls. From Monday through Wednesday, Bost was involved in a dozen house calls and in his judgment the reaction was encouraging. Six signed applications for membership were secured during that period and a commitment to sign made by one other which commitment was fulfilled on Monday, September 24th.

10. On or about September 18th, Stewart testified that his Secretary gave him a message for Mr. Pratt from Mr. Doherty, Assistant to Vice-President, Labour Relations, of the respondent. Stewart decided to return to call on Pratt's behalf. Stewart testified that Doherty seemed to be distressed by the campaign and the fact that two employees on leave of absence were using assumed names and were registered at the Queen's Grant Motel. Stewart undertook to check this out and on so doing states the allegation of assumed names was unfounded. Stewart testified that "Doherty said that they had done some things in the Brockville plant which they had not done at other plants and that he thought a union was inappropriate in that facility".

11. Bost stated he approached four or five persons on Thursday and stated he sensed some reluctance and was told that there was a lot of conversation in the plant and that people were beginning to build some fear of signing. Activity on Friday was limited to attending at a location where it was expected one employee would be but that employee did not show up. On Friday the organizing group learned that there had been an in-plant employee meeting held at which an employee Frey spoke and that all machines had been shut down for the meeting. On Saturday, four house calls were attempted without resulting in seeing anyone. Bost states that starting on Thursday some of the employees expressed the fear that "if Management ever found out who the instigators were they would be fired". There was no identification of any specific threat but this seemed to be an opinion held by some employees. Bost states that other organizers got the same reaction.

12. Russell Pratt, a full-time representative of the applicant who was assigned to the campaign, arrived in Brockville on Wednesday, September 19th. He met with the rest of the organizing team and was updated on activities and was told that they were reasonably optimistic in their appraisal. Pratt made three house calls that night. At the first call he spent 1½ to 2 hours in friendly discussion. The major concern expressed by that person for herself (and others she knew) related to job security which apparently sprang from a recent lay-off in which seniority had not been followed. At his second, the issue of security was again raised and the call was again "friendly and enjoyable". Pratt made one further call and was invited in, but, in view of the lateness of the hour, declined with thanks and left his card. Pratt did not receive any signed cards.

13. Pratt states he saw three to five people on Thursday and while he did detect some apprehension amongst employees visited, he did not consider it anything more than normal apprehension, and his assessment of the campaign at that stage is that it was "going in a reasonable fashion".

14. On Friday, Pratt and another organizer expected to meet with an employee from the plant to get more employee leads and also to get a "handle" on the needs of employees. The plant employee did not show up and the meeting was not held. Pratt and his colleagues then endeavoured to make more calls without prior appointment and as he says "we drove a lot of miles but no one was home". It was when Pratt returned for supper that he heard some comments about a plant meeting. He states he made several more unsuccessful calls that night.

15. Pratt was asked in cross-examination if he knew what was disturbing people and responded "all I could gain was that they were afraid for a whole variety of reasons but most afraid of losing their jobs". When asked if they were afraid of Frey, his response was "I had

people express concern about him. He had assumed a leadership position in the plant and they were afraid to go against his wishes. He seemed to have political support". Pratt stated that not more than three had expressed this apprehension, and that he had asked others some of whom said no and others did not want to discuss it.

16. On Saturday, Pratt was on his own (the two temporary organizers having returned to London for the weekend). Pratt made a phone call to verify the Friday plant meeting, reported to Stewart by phone about his progress, and then proceeded to re-visit those persons he had seen on Wednesday (having then told them he would return). He had a brief and tense conversation with the first person who stated "I'm not interested. Thank you". Pratt then returned to the unanswered house call he had made in Friday and again there was no one home. He then re-visited the second person (from his Wednesday visits) and received much the same response – although not so terse – as he had from the first person. Pratt states this person indicated she was afraid to carry on a conversation with the union; said she had heard about the meeting and did not really know what had been said, and that if she had any interest would contact Pratt.

17. Following a late dinner Pratt returned to his room and about 10:00 p.m. received a phone call from Frey, who introduced himself and asked if it were possible to have a meeting to which Pratt agreed and it was decided to meet at Frey's house at 10:00 a.m. on Sunday. Pratt then called Bost and invited him to attend the meeting.

18. It is appropriate here to advert back to a discussion of the events leading up to the plant meeting of Friday, and the meeting itself.

19. Mr. C. R. Graham, who was Operations Manager at Brockville at the time, stated that he first learned of the organizing campaign on Tuesday, September 18th as a result of a short meeting in his office initiated by a bargaining unit employee, Terry Ward. Ward advised that his wife had been visited by two men about the union and asked for Graham's advice. Graham states he told Ward to see them and see what they had to say. Graham states that Ward's wife was initially approached and subsequently Ward was approached. Graham states Ward told him that he thought they were London employees. Graham then phoned one, Doherty, Personnel Officer in London, Ontario, and relayed the information. Graham states he was surprised London employees could get a leave of absence for this purpose. Graham states he had no further discussions about organizing until Friday morning, September 21st when Frey asked for an appointment with him.

20. Ward, in his evidence, states he had received a phone call around noon from his wife who was concerned that two men representing a union had come to the house twice. Ward speculated that his wife's concern could have been based on an apprehension that these men were strikers, inasmuch as there was then in progress strikes at both the London and Montreal plants (not involving the present applicant). Ward went to Graham to see if he knew what was going on and what he should do. He states Graham contacted London and then informed him that "all he could tell me was to go ahead and see what those men had to say if they returned". Ward did meet with the two temporary organizers that night. The evidence is not clear as to when Graham learned of Ward's meeting with the organizers since, obviously, it could not have been prior to Ward's meeting with them and Graham states that he heard nothing more about organizing between the time of meeting Ward in his office and the following Friday morning when he met with Frey.

21. Mr. Thomas Frey, who is classified as a No. 1 Pressman, testified that he first heard of the union organizational campaign on Tuesday, September 18th from Mr. Ward and others, and there were also some individual discussions about the campaign. Frey was approached by the two temporary organizers at his home on Thursday and there were discussions about the union's London contract including a union reference to an incentive bonus of 15% and "slowing down" the machines, and including a union acknowledgment that benefit programs of the Brockville employees were better than in London. Frey discussed the meeting with a few co-workers and the consensus was that it was not feasible to slow the machines down and that it might cause a loss of jobs. The upshot was that they thought something should be done to clear the air such as an employee gathering: Frey states that most people were afraid the union would get in because of what they were offering, and that most people were hesitant to talk about the campaign. On Friday morning, September 21st, Frey mentioned his desire to have an employee gathering to the Assistant Operations Manager who stated he would see Graham, the Operations Manager and "get back". Graham states he was told Frey wished to see him and it was something about union organizing, and Graham arranged to see Frey around 10:00 that day.

22. When Frey appeared in Graham's office he appeared extremely upset and Graham enquired as to what was the problem. In Graham's words, Frey told him, "the union is trying to organize and he did not want a union in the plant. He felt it would jeopardize his job and other jobs. He realized they were running a lot of orders as a result of the strike in the London and Montreal plants, and that if they tried to organize he would lose his job. He asked for permission to talk to all employees stating that if the union could go around and talk he felt he should have the same opportunity". In cross-examination Graham stated that Frey had told him he had had prior dealings with unions and did not like the relationship. Frey stated he felt they could get as much without a union, and that they had as much to lose as to gain, and that he felt if we were non-union we would be able to run the Montreal work, whereas, if the union were in we would not be able to. Frey felt the quickest way to handle it would be to get both shifts together and he asked if he could conduct a gathering to talk to both shifts. Graham states he wanted to think about it and told Frey he would get back to him. Frey then returned to the plant where he talked with people and told them he had seen Graham and there was a possibility of having an employee gathering.

23. Graham states that in thinking about the request he concluded that so long as he specifically stated to Frey that the union be given an equal opportunity i.e., that Frey tell the meeting that if there was anyone there from the union they were to be given equal time, it would be all right. Graham then consulted White, Vice-President Industrial Relations, who agreed with the conclusion Graham had reached.

24. Graham then called Frey at about 12:00 noon and told him he could talk to the employees but, that he wanted to be sure that Frey advised any members who wanted the union that they would have equal time, and Graham stressed this several times. Graham then arranged for the close down of production between 2:30 p.m. and 3:30 p.m. that day which would "give both groups a chance to put their case". and arranged that no supervisors or office staff would be present in the manufacturing area during that time. When Graham was asked if he was concerned about losing one hour's production, he stated he was, but he felt it was "a small price to pay if it kept employees happy either way" and that he felt it best the pros and cons be discussed.

25. Frey then passed the word that he had been given to OK to hold a plant meeting and that he would like to express his views on the union and, also outline the existing employee benefits. Frey states that he encountered some people who were not too sure of his purpose and thought he might be intending to talk in favour of the union.

26. At 2:30 p.m. Frey told machine operators who came to him and asked, that it was OK to shut the machines down. Frey opened the meeting by stating that the purpose was to clear the air and stated that everyone was walking around not knowing what other fellows were thinking and that he "just wanted to open it up and clear the air". Frey then made a detailed presentation of existing insurance and pension benefits, stated that the company was providing in next year's budget a total of \$12,500 for social functions, reference to a 10% wage increase effective December 1, 1979 (and which had been announced by the company in May) as being "guaranteed" and that the union could guarantee nothing.

27. Frey stated that he told the meeting that the employees had been told when they received Dental Insurance and Pension Benefits that these were salaried benefits, and Frey stated to the meeting that if union comes in "we would not be salaried employees any longer and therefore we would likely lose these benefits". He expanded in his theory of the Brockville plant rationale as being that it was established as a non-union shop providing the flexibility of "seven days a work week e.g. Montreal strike" and pointing out that if organized perhaps they would have to support another division. The hand written notes Frey made, summarizing what he had previously said, and which were duplicated by him on the company premises and 50 copies distributed to employees on the subsequent Tuesday, contains the following reference,

"If a union was to come into our plant, the company might consider moving the operation closer to the tobacco industry which, in all likelihood, would be Montreal or Toronto since there would no longer be any advantage in staying in Brockville. What would union security then do for you when the Company has closed the plant down? Don't forget – the company does not own the building – only the machinery in the building – and the moving of the machinery would only be a drop in the bucket in comparison to a strike like the one already in progress (for 5 months) in the Montreal plant.

The company has intimated that they plan to expand the plant and purchase additional Gravure equipment. Our chances of seeing these commitments become reality are much more probable if we continue with a non-union set up."

Frey also stated at the meeting that he expressed his view of the possibility of the plant being moved because "I felt the idea was to be non-union, and there was the possibility the company could move the machines to Montreal or to Toronto, and that the plant could be shut down in six months, or twelve months or two years".

28. At this point in the meeting Frey stated that "a person representing the union in the plant would be given equal time", and opened the meeting to questions. Frey states there was a question as to where he got the views regarding a plant shut down and he explained that it was from his knowledge of the location of the tobacco industry. He was quer-

ied about why employees should lose dental insurance and pension coverage and he explained that these things were part of the salaried concept. He was queried about the 10% wage increase and he told the meeting it would be a minimum guarantee of 10%. He states no one asked if they would get the wage increase if the union were successful but that he told the meeting the union could not guarantee 10% 8%, or 5%.

29. The meeting with the day shift ended at 3:00 p.m. and the employees of the oncoming shift assembled in the Press area. Frey told them what was going on, reviewed the same format and gave them the same opportunities. There were no further questions raised at that meeting. No one, at either meeting, spoke to present the union's side.

30. Mr. J. Okes, employed by the respondent since May 28, 1979 and a previous member of the Printing Pressmen's Union for 5 years, testified that before September 21st there was a lot of confusion about what was going on and a lot of anti-union talk and that after the meeting people were calmer and people were talking to one another: Mr. K. Kubiak testified he felt the meeting would "clear the air".

31. Mr. T. Ward, employed since November 1978, had been a union member in previous employment, and after being solicited by the union earlier in the week testified, "I did feel this could be a threat to the good atmosphere we had been experiencing in the plant" and that he talked to a majority of people on the day shift and never found anyone in favor of the union. Ward states that if there was any atmosphere of fear, it would be the fear of loss of the good atmosphere and the open door policy. Ward's evaluation of what Frey's objective was at the September 21st meeting was "that he was trying to lay the cards on the table and to inform people".

32. On Sunday, September 23rd, Bost and Pratt went to Frey's home as previously arranged, and there was a long two hour meeting during which the London union contract was examined and compared with existing conditions at Brockville, and an early question posed by Frey as to what the union could guarantee, eliciting a response of "no guarantees". Frey states that he concluded they would be "more harm to us than good" and voiced that view. Conversation turned to the Friday meeting and Pratt asked Frey if he had, in fact, said the plant would close down if the union got in and Frey responded, that what he had said was, the plant could close down in 6 months if the union got in.

33. Pratt states they then discussed how the meeting was called and if management knew of it and Frey's reply was "No. They didn't know, we are going to have it *per se*". When queried as to where he got the information relating to benefits Frey stated, it had been secured earlier that day from the company. Frey is said to have stated "I called the meeting. I can call meetings whenever I want". Pratt asked if Frey wanted a union and Frey indicated he had belonged to unions in the past and was not interested. The discussion turned to the issue of balanced views with Frey indicating he would like to have a balance of union and non-union, and stated that if the union called a meeting he would make sure all the people would be there. Pratt states that he declined the offer because he felt it would be inappropriate for Frey to do that as he had already strongly stated his views. Pratt, in referring to the plant meeting, told Frey "you are either interfering with the formation of the union, or if the company had given no consent and you had the people shut down the equipment that could be construed as an illegal strike". Pratt states Frey acknowledged the statement without confirming either alternative, and said, "I don't want a union. The Company doesn't want a

union” and the meeting was terminated. Frey’s version of the meeting is substantially confirmatory of Pratt’s. Frey testified that he told Pratt and Bost they were guaranteed to have equal time by some representative in the plant but that, “they thought the harm had been done by the reference to plant shut down and that in regards to an outside meeting “they felt the harm had been done and having a meeting probably would not get many people out”. In cross-examination Frey was asked why he had gone to the trouble of meeting with Pratt and Stewart and responded, “I knew they wouldn’t change my mind. To make sure he knew of the offer of equal time. Thought it the fair thing to do”.

34. White, Vice-President, Industrial Relations, testified that some time after September 21st he received a phone call from Stewart who was upset by the September 21st meeting. The conversation seems to have been centred on the union’s complaint that the September 21st meeting was improper and the company’s complaint of the union using “union business” as a basis for securing leave of absence for the temporary organizers. In regard to the September 21st meeting White said “we offered you equal time” or “do you want equal time”, which Stewart rejected as being equally improper. In respect to the September 21st meeting, White testified, “a meeting in working hours over a serious issue is really within the open concept”.

35. On Tuesday, September 25th, Frey and some others decided to get a list of employee signatures of persons not wanting the union, and intended to pass this to the union with the request that the union end its campaign. The idea was implemented but, because Frey and others had misgivings about its use “because some might sign because they thought they were obligated to sign, being on company premises” and because “we thought it was not fair to people who wanted a union, being on company premises and time”, the document was never used.

36. The following week Frey was at home on vacation when he received a call from a fellow employee stating that the Board’s Notice of Application for Certification was posted. Frey went into the plant, took one of the copies from the notice board, discussed with a few other employees and decided to take action under paragraph 4 of the notice. Frey, for two or three days, parked his car on the road across from the plant and collected signatures of employees going in and out. That document, containing 119 signatures, was filed with the Board.

37. The union continued its organizing activities until September 24th when they were discontinued, through distribution of a leaflet at the plant gate and making house and phone calls through until September 27th. Bost states that even before September 27th they felt it was “futile to continue”, as a result of unproductive house calls. Pratt states that during this period he made a number of house calls and, in three or four cases concerns were raised by the employee as to the Montreal strikers, what the union could guarantee if the employee joined, and requests that the fact the union had talked to them not be disclosed. Pratt states in another case he was told by the mother of an employee to “go away”. In another case, in calling on an employee and her husband with whom he had gone to school, the husband, who is not an employee and who had formerly had a position of union leadership told Pratt, “My wife just can’t take it. The fear, the worry, Russ, go away”.

38. The complainant argues that Frey, in his personal capacity contravened section 61 of the Act and/or that Frey was acting as a representative of the respondent employer and as

such both Frey and the employer contravened sections 56, 58(c) and 61 of the Act. The sections referred to read as follows:

“56. No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

58. No employer, employers’ organizations or person acting on behalf of an employer or an employers’ organization,

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any rights under this Act.

61. No person, trade union or employers’ organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers’ organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.”

The respondent employer argues that at no time did it authorize Frey to act on its behalf nor did it subsequently adopt Frey’s statement and that, in any event, Frey’s statements were not such as would be reasonably perceived by employees as emanating from the employer. The respondent Frey argues that all views expressed were in fact his own and would have been so received by employees and that, such views were not expressed in an intimidatory or coercive way nor, did he have any power to compel any action by employees.

39. The issues before the Board are, whether Frey’s conduct is in contravention of the Act and, if so, whether Frey is to be viewed as a person “acting on behalf of an employer”, and if not, whether the respondent employer has contravened the Act.

40. In our view, in arriving at a conclusion as to the likely effect of the September 21st meeting on employees, we must look both to the content of the meeting and to the total environment surrounding it. In this connection, it is to be noted, that at least some employees were aware prior to the meeting being called that a request had been made by Frey to hold a meeting and that the matter was being considered by management. Also, a meeting was called by Frey, “passing the word” that he had been “given the OK”, and telling people that he would like to express his views on the union and also what existing benefits were; and we think it a fair inference from the evidence that employees were aware that the views expressed would be in opposition to the union. There is no evidence that despite Graham hav-

ing emphasized several times that equal time was to be given to any employee union supporters, that this was mentioned in the calling of the meeting (and indeed this topic appears to have been given minimal emphasis at the meeting itself). It is also noted that at 2:30 p.m. the machine operators came to Frey for approval to shut down the machines. We can only conclude that prior to the meeting, employees were well aware that the purpose of the meeting was to give Frey an opportunity to express his views in opposition to the union. We are also satisfied that Graham was well aware of the purpose of the meeting to the extent that he considered it important to introduce the "equal time" concept. Several witnesses (including Frey) testified that the purpose was to "clear the air" and that objective had been accomplished by Frey's presentation.

41. As to the meeting itself, considerable time appears to have been spent on the enumerating of existing benefit levels, some of which, were identified as "salaried benefits" and therefore likely to be lost on unionization, and a comparison of certain other economic working conditions which were more favorable than those likely to be in a union contract. What is of particular interest to the Board is, the linkage by Frey of the employees' future job security to continued individual rather than collective bargaining. He stated in evidence that he had expressed his view of the possibility of the plant moving if they became unionized because, he felt, that the idea of the plant at the beginning was that it was to be non-union and that it was therefore possible that it could be shut down if it became unionized.

42. Views expressed by individual employees either pro- or anti-union in the course of an organizing campaign may be wide-ranging so long as they are clearly identifiable as personal opinion and nothing more. Views which equate membership or non-membership in a union to continued job security, cease to be mere personal views and may become intimidatory or coercive if the person expressing them is perceived to be seized of special knowledge, or position, such that raises the statement from a matter of opinion to one of probable fact. The instant case is one in which the views expressed were in fact coercive by reason of the special circumstances. There was no evidence that any other in-plant employee meeting had been previously held for any purpose and that fact heightened the importance of the issue to be discussed. Production was brought to a halt for one hour at no loss of pay to employees; employees were aware that the purpose of the meeting was to express views in opposition to the union and were aware in advance that Frey had secured management approval for the meeting and to halt production. The message to employees was clear that their economic well being and job security would be in jeopardy if they joined the union. The message was delivered by a person who had demonstrated his ability to persuade the employer (at some economic cost) to provide him with a forum to express his views. In the view of the Board, the message delivered under such circumstances would be received by employees as being one having a good degree of likelihood of being made effective. We conclude that Frey's conduct was intimidatory and sought to interfere with the free exercise of employees' rights under section 3 of the Act. We find the respondent Frey to have contravened section 61 of the Act.

43. We turn to the questions of whether the respondent employer acted in contravention of the Act, and whether Frey was a "person acting on behalf of an employer" within the meaning of sections 56 and 58(c) of the Act.

44. As has been said by the Board in many past occasions, the general thrust of the legislation is to ensure that there be an arms length relationship between an employer and

trade union and to that end section 3 provides that “every person is free to join a trade union of his own choice and to participate in its lawful activities”, and sections 56, 58 and 61 proscribe conduct which interferes with that freedom. The Board’s jurisprudence is clear that the gratuitous use of premises provided by an employer in connection with the formation of a trade union constitutes “other support” within the meaning of section 12 of the Act and precludes the certification of such an employee organization. See the case of *Alco Compounds Inc.* [1919] OLRB Rep. Sept. 845, and the references therein. We know of no instance in which the Board has dealt directly with the effect of gratuitous use of premises in respect to an alleged contravention of section 56. The question in the instant case is, whether, such gratuitous use of premises to supporters of those opposed to union organization constitutes a contravention of the section, and whether the offer of “equal time” to union supporters takes the conduct out of an otherwise potentially offending character.

45. Counsel for the respondent employer did not argue that there was involved in this case the employee’s freedom of expression but, on the contrary, argued that the employer had no direct or indirect responsibility for what may have been said or done by Frey. In any event, in our view, there is a substantial difference between an employer expressing his own views and that of giving support to another party, to express that other party’s views even though the desired objective of each is the same.

46. It is clear to us that the respondent employer, by making available its premises to employees interested in mobilizing opposition to the union, and in undertaking to halt production without loss of wages to employees, was providing those interested in opposing the union with a substantial advantage over those who were endeavouring to marshal support for the union. As Frey himself expressed at the time of requesting permission to hold the meeting, a meeting was the “quickest way to handle it” and in our view both easier and more expeditious than going through individual canvassing such as was being done by the union. Obviously, it gave the Frey group quick and direct access to the total employee group.

47. There may be a given case where the gratuitous use of premises effectively provides a forum, equally accessible to all competing groups of employees to present their views by representatives of their own choice, which would not offend the legislation. In the instant case the manner and the content of the “equal time” offer were both defective in providing any meaningful opportunity to any group other than the Frey group. It must be noted that Graham left the implementation of “equal time” in the sole hands of Frey, that it was clearly not available to “outsiders” but only to employees insofar as union supporters were concerned, that no prior notice was provided to union supporters so that they might consider organizing a presentation as Frey did, that there would be understandably, great reluctance by individual employees, to expose their support of the union. All these considerations militate against a conclusion that in fact the meeting would result in an even-handed presentation of opposing views. In point of actual fact, the announcement to the meeting of equal time appears to have been sandwiched between the end of Frey’s formal presentation and the commencement of the question period, in such a way, as invites the conclusion that it would have been physically impossible to have provided an allotment of equal time had there been a demand for it. The Board can only speculate that it was a recognition of the inadequacy of the actual equal time offer which caused Frey to make his offers to the union organizers on Sunday to assist in organizing meetings of employees at which the union case could be presented.

48. The Board concludes based on all the evidence, that the gratuitous use of premises in the circumstances of this case must be construed as interference by the respondent employer in the selection of a trade union in contravention of section 56 of the Act.

49. We do not think that the evidence justifies a finding that Frey, was a person acting on behalf of the respondent employer, and the complaints alleging violation of sections 56 and 58(c) insofar as he is concerned are dismissed. It also follows that the respondent employer cannot be taxed with Frey's conduct and the complaint alleging violation by the employer of section 58(c) is dismissed.

50. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on October 9, 1979, the terminal date fixed for this application, and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Ordinarily this would result in the Board dismissing the application for certification but in this instance the applicant requests the Board exercise its discretion under section 7(a) of the Act.

51. The union argued that the Board should exercise its discretion under section 7a of the Act to issue a certificate or, alternatively, the Board should exercise its broad remedial powers under section 79 to adjourn the certification proceeding and to fix a new terminal date into the future, to give the union the opportunity of securing and filing with the Board, additional evidence of membership support.

52. The Board has no hesitancy in finding that the union here does not have membership support adequate for collective bargaining (in fact, less than 5% and on that ground alone the conditions precedent to the exercise of the Board's discretion have not been satisfied). As to the suggestion that the Board act under section 79 to provide the applicant additional time to perfect its application, we have grave doubts of our authority to so act, but in any event we see nothing which would be accomplished which could not be accomplished by the filing of a new application by the union. The present application is therefore dismissed.

53. The union seeks, under section 79, an order to go to the respondents compensating the applicant for its organizing costs, a cease and desist order against Frey and curative action to remove the lingering effects of the contraventions.

54. In the total circumstances we are of the opinion that this is not an appropriate case for the Board to make an award of damages.

55. The Board orders and directs Mr. Thomas Frey to cease and desist from all future conduct towards any employee of Somerville Belkin Industries Limited at its plant in Brockville, Ontario which is a contravention of section 61 of *The Labour Relations Act*.

56. The Board orders and directs Somerville Belkin Industries Limited at its plant in Brockville, Ontario, to cease and desist from all future conduct which is in contravention of section 56 of *The Labour Relations Act*.

57. The respondent Somerville Belkin Industries Limited is directed to post copies of

the attached notice marked "Appendix", after being duly signed by the respondent's representative, in conspicuous places at its place of business at Brockville, Ontario where it is likely to come to the attention of the employees, and to keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the union so that the union can satisfy itself that this posting requirement is being complied with.

58. The respondent is directed forthwith to convene during working hours a meeting of all employees and a representative of the respondent is directed to read the attached notice marked "Appendix" to the employees. The respondent is further directed to afford two representatives of the complainant a reasonable opportunity to be present at the said meeting.

DECISION OF BOARD MEMBER M. J. FENWICK:

1. I dissent. As a consequence of the illegal action of the respondents, the Canadian Chemical Workers Union lost an opportunity to organize the company's employees. There is no way to determine how much support was lost to the union.

2. The majority of the Board concludes, as in Paragraph 49 of this decision, that Frey was not acting on behalf of the employer and the employer in turn cannot be taxed with Frey's conduct. I disagree.

3. In the context of the existing circumstances in which all employees knew the plant was moved from Montreal to Brockville to escape dealing with a Quebec-based union, I believe the employees were well briefed that the company wanted to operate a non-union plant.

4. It was in this context that Terry Ward informed C. R. Graham, plant operations manager, that union organizers had visited his home. His wife phoned him at the plant about the visit. Following Ward's move, Frey asked and received permission to call an anti-union meeting of the employees.

5. The company cannot be absolved from complicity in the bid to abort the union's organizing campaign. I would find the company also in violation of Section 58(c) of the Act.

6. I concur in the order of the majority that the notice be posted in the plant and read to employees. I also would order the company to mail a copy of the NOTICE to all employees and in addition order that it supply the union with a list of employees and their addresses.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

APPENDIX

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE THE UNION AND THOMAS FREY ALL PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY MAKING OUR PREMISES AVAILABLE DURING WORKING HOURS TO THOMAS FREY FOR THE PURPOSE OF ADDRESSING AN EMPLOYEE MEETING ON HIS VIEWS IN OPPOSITION TO THE CANADIAN CHEMICAL WORKERS UNION.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY OR ALL OF THESE THINGS.

WE ASSURE ALL EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

THE BOARD IN ITS DECISION OF May 28, 1980 FOUND THAT THE CONDUCT OF THOMAS FREY AT AN IN-PLANT MEETING HELD ON SEPTEMBER 21, 1979 WAS INTIMIDATORY AND COERCIVE AND IN CONTRAVENTION OF SECTION 61 OF THE LABOUR RELATIONS ACT WHICH READS:

"NO PERSON, TRADE UNION OR EMPLOYERS' ORGANIZATION SHALL SEEK BY INTIMIDATION OR COERCION TO COMPEL ANY PERSON TO BECOME OR REFRAIN FROM BECOMING OR TO CONTINUE TO BE OR TO CEASE TO BE A MEMBER OF A TRADE UNION OR OF AN EMPLOYERS' ORGANIZATION OR TO REFRAIN FROM EXERCISING ANY OTHER RIGHTS UNDER THIS ACT OR FROM PERFORMING ANY OBLIGATIONS UNDER THIS ACT."

THE BOARD IN ITS DECISION OF May 28, 1980 ALSO FOUND THAT THE CONDUCT OF SOMERVILLE DELKIN INDUSTRIES LTD. IN MAKING AVAILABLE ITS PREMISES ON SEPTEMBER 21, 1979, DURING WORKING HOURS, TO MR. THOMAS FREY FOR THE PURPOSE OF EXPRESSING HIS VIEWS IN OPPOSITION TO THE CANADIAN CHEMICAL WORKERS UNION, CONSTITUTED A CONTRAVENTION OF SECTION 56 OF THE LABOUR RELATIONS ACT, WHICH READS:

"NO EMPLOYER OR EMPLOYERS' ORGANIZATION AND NO PERSON ACTING ON BEHALF OF AN EMPLOYER OR AN EMPLOYERS' ORGANIZATION SHALL PARTICIPATE IN OR INTERFERE WITH THE FORMATION, SELECTION OR ADMINISTRATION OF A TRADE UNION OR THE REPRESENTATION OF EMPLOYEES BY A TRADE UNION OR CONTRIBUTE FINANCIAL OR OTHER SUPPORT TO A TRADE UNION, BUT NOTHING IN THIS SECTION SHALL BE DEEMED TO DEPRIVE AN EMPLOYER OF HIS FREEDOM TO EXPRESS HIS VIEWS SO LONG AS HE DOES NOT USE COERCION, INTIMIDATION, THREATS, PROMISES OR UNDUE INFLUENCE."

SOMERVILLE DELKIN INDUSTRIES LTD. HAS BEEN DIRECTED TO POST THIS NOTICE, TO KEEP IT POSTED FOR A PERIOD OF SIXTY DAYS AND TO PERMIT ACCESS TO THE PLANT OF TWO REPRESENTATIVES OF THE CANADIAN CHEMICAL WORKERS UNION FOR THE PURPOSE OF SATISFYING ITSELF OF SOMERVILLE DELKIN'S COMPLIANCE WITH THIS POSTING ORDER.

SOMERVILLE DELKIN INDUSTRIES LIMITED
- TROCKVILLE PACKAGING DIVISION

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 28TH day of MAY, 1980

(D. K. AYNLEY)

Registrar.

0936-79-R Local 663 of the Service Employees International Union A.F. of L., C.I.O., C.L.C., Applicant, v. **Trenton Memorial Hospital**, Respondent, v. Group of Employees, Objectors.

Certification – Practice and Procedure – Representation Vote – Employee status changing from part-time to full time – Board determining whether voters part-time or full time as of date of order and date of vote – Seven week rule applied to both dates

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *G. Charney, Q.C., Jack Nichols and S. Shrybman for the applicant; Brian W. Burkett, J. Luptin, M. Noel and R. A. Adams for the respondent; Grace Ingle, Christine Scott and Della M. Dafoe for the objectors.*

DECISION OF THE BOARD; May 9, 1980

1. This is an application for certification in respect of a bargaining unit of office and clerical employees in the respondent's hospital at Trenton. By a decision dated January 24, 1980, the Board ordered a representation vote among the employees in the bargaining unit. The bargaining unit excludes, among others, "persons regularly employed for not more than 24 hours per week".

2. In ordering the representation vote the Board made its normal statement respecting voter eligibility:

"All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote."

3. The vote was taken on February 21, 1980. The unusual aspect of this case is that over six months elapsed between the time that the application for certification was filed on August 18, 1979 and the date the representation vote was finally taken. While the application was initially heard on September 11, 1979, disagreement between the parties as to the composition of the bargaining unit required the appointment of an examiner with the inevitable delay of further hearings to resolve that issue.

4. By the time the examiner's report came on for hearing before the Board there were three issues outstanding:

1. The method which the Board should use to designate full-time and part-time employees as at the date of application.
2. Whether one employee was a technologist or a clerical employee.
3. Whether two employees with bookkeeping responsibilities exercised managerial and confidential authority so as to be excluded from the bargaining unit.

Those issues were disposed of by the Board's decision of January 24, 1980. (*Trenton Memorial Hospital* [1980] OLRB Rep. Jan. 116). Among other things the Board concluded that the "seven week rule" should be applied to determine which employees were full-time and which employees were part-time for the purposes of determining the list of employees in the bargaining unit on the date of the application. In other words, any person who worked for more than twenty-four hours per week during four or more of the seven weeks immediately preceding the application date was found to be a full-time employee falling within the bargaining unit on that date. (*Sydenham District Hospital*, [1967] OLRB Rep. May. 135). That is the procedure by which the Board generally determines the number of employees in the bargaining unit in respect of which the membership evidence of a union is assessed, to see whether the union is entitled to outright certification, to a representation vote or whether the application should be dismissed (*R. v. OLRB ex p. Hannigan* [1967] 2 O.R. 469 (C.A.)).

5. When the vote was taken on February 29, 1980 ballots were cast by all 33 employees whose names appeared on a previously prepared voter's list. The voter's list was signed by representatives of the hospital, the union and the group of employees objecting to the application. Received by the Board on February 6, 1980, the list indicated that four employees, N. Baldree, M. Lloyd, J. Thompson and J. Morin were challenged as being ineligible to vote. The union took the position that Baldree, Lloyd and Thompson were part-time employees either on the date that the vote was ordered or the date that the vote was taken and were therefore not entitled to vote. The employer took the position that Morin was a part-time employee on the date of application within the meaning of the Board's decision of January 24, 1980 and that she was therefore not entitled to vote. The ballots of these four employees were therefore segregated when the vote was taken. Of the remaining ballots cast 15 were marked in favour of the union and 14 against. The Board's ruling on the eligibility to vote of the 4 challenged employees could, therefore, determine the outcome of this application.

6. The issue is the standard to be applied to determine whether an employee is full-time or part-time for the purposes of voter eligibility. Counsel for the union submits that to determine whether an employee is a full-time employee with eligibility to vote the Board must apply a twofold test, asking itself first whether the employee was in the bargaining unit on the day that the vote was ordered and, secondly, whether he was in the unit on the day the vote was taken. He submits that the seven week rule must be applied at each of those dates, and if on each of those days the employee could be described as "regularly employed for not more than 24 hours per week" he or she is eligible to vote.

7. Counsel for the respondent submits that when the Board, in its decision of January 24, 1980, determined that the seven week rule should be applied for the purposes of separating full-time from part-time employees, it in effect applied that rule once and for all. In other words, he submits that an employee who is determined to be a full-time employee on the day of application is entitled to vote, and that that person's status is not to be reassessed either as at the date that a representation vote is ordered or the date the vote is taken.

8. Normally, a representation vote can be held fairly quickly after the date that an application for certification is received by the Board. In that situation applying the seven week rule on the date of application to determine the list of employees for the purposes of assessing membership strength may well produce substantially the same list as would result

if the same test is applied on the dates that the vote is ordered and taken. But that becomes less true as time passes between the date of application and the date that a vote is taken. Where, as in this case, there is a lapse of six months between the application date and the date of the vote, the likelihood of turnover among the employees in the bargaining unit increases. That is why the eligibility of an employee to vote is based not on his status on the application date, but rather, on his status both on the date that the vote is ordered and the date that the vote is taken. Part of the reason for the two-pronged rule is to ensure, insofar as possible, that the vote will reflect the wishes of the employees with the most direct interest in its outcome – namely the employees who are in the bargaining unit at the time that the vote is taken. (*J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316; *London District Crippled Children Treatment Centre*, Board File No. 1780-79-R, April 28, 1980, as yet unreported). Persons who have become strangers to the bargaining unit by the time the vote is taken do not have a right to vote, notwithstanding that they may have been in the bargaining unit on the date that the application for certification was filed.

9. In this case the employees eligible to vote, by the very terms of the Board's Order, are those who were *regularly* employed for not more than 24 hours per week on January 24, 1980 (the date that the vote was ordered) who were also *regularly* employed for not more than 24 hours per week on February 21, 1980 (the date that the vote was taken). The question then becomes how on each of those two dates an employee can be described as regularly employed for not more than 24 hours. That can't be done by looking to their status on the date of application. Nor can it be done by looking only at the two weeks in which those days fall. The term "regularly" implies an examination of an employee's hours of work over a more extended period of weeks. The test that the Board has devised for that determination is the seven week rule. It has been successfully applied to determine bargaining unit membership on the date of application. There is no reason why it can't apply with equal validity where a dispute arises with respect to the eligibility of an employee to vote.

10. For the foregoing reasons the returning officer is instructed to inquire and report back to the Board on the status of the four challenged employees as of January 24, 1980 and February 21, 1980. He shall apply the seven week rule to each of them on each of those dates. Their votes are to be counted if by the application of that standard they fall within the bargaining unit on both dates.

11. Two employees appeared at the hearing to protest the conduct of the representation vote. They objected to the fact that the poll was temporarily closed while the Board's Returning Officer left the polling room, taking the ballot box with him, in order to call the Board for procedural instructions.

12. The Board is the agency designated by the Legislature to administer and supervise the certification of trade unions by the taking of representation votes. The Board's Returning Officers are the persons specifically charged with the conduct of a vote between the two or more parties to a certification. Unfortunately the opposing parties to a vote can, on occasion, display a very real measure of antagonism and mutual suspicion. In those sometimes volatile circumstances caution is to be preferred to the risks of an honour system.

13. For these reasons it is the Board's standing instruction to its Returning Officers that at all times during the course of a representation vote the ballot box remain continually in their presence and custody. Returning Officers are not privy to all of the issues between

the parties, and to the extent that disputes can arise during the course of balloting it is inevitable that a Returning Officer will occasionally be obliged to suspend the balloting for the time that it takes to obtain instructions from the Board. The fact that the Officer took the ballot box with him in just such a circumstance is, therefore, entirely proper and is no basis to vitiate the balloting. While the complaining employees may have been inconvenienced by having to wait for their opportunity to vote, there is no suggestion that either they or any other employees were denied a fair and sufficient opportunity to cast their ballots.

14. The application shall be remitted to the Registrar.

1555-79-U Joseph Neblett, Complainant, v United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Respondent.

Duty of Fair Representation – Union establishing two divisions within local – Passage into commercial division requiring successful completion of examination – Whether granting hiring preference to commercial division members discriminatory – Whether examination discriminatory

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Charles Roach and Joseph Neblett for the complainant; L. C. Arnold and W. Howard for the respondent.*

DECISION OF THE BOARD; May 9, 1980

1. This is a complaint under section 79 of *The Labour Relations Act* alleging a violation of sections 60 and 60a of the Act. Those sections provide as follows:

“60. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

60a. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.”

The essence of the complaint, as outlined at the outset by counsel for the complainant, is that the respondent trade union, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, has two sections in its membership and has a practice of recommending members in its “commer-

cial” section in priority over members in its “residential” section to commercial jobs. While the evidence placed before the Board was extensive, the fact is that the respondent trade union readily admits to the practice complained of, and indeed refers to its Constitution as the foundation for the practice. The simple question for the Board, therefore, is whether or not such a practice can be said to be in violation of either section 60 or section 60a of *The Labour Relations Act*, as alleged.

2. The evidence establishes that the residential section of Local 46 had its origins in the construction boom of the mid-1960s. In Metropolitan Toronto in particular, that period witnessed a tremendous increase in the number of high-rise residential units being constructed, which in turn brought onto the scene a significant number of previously unorganized tradesmen to serve this residential sector. The officers of the respondent Local 46 therefore began to consider how organization of this new sector could best be accomplished. The said officers first had regard to the eligibility requirements for membership in the respondent, which, according to its Constitution, provided as follows:

“Sec. 158. Every applicant for membership as a journeyman in a Building and Construction Trades Local Union or a Combination Local Union (Building and Construction Trades Branch) must be a skilled craftsman and his application must contain information as to his experience and/or training. These qualifications must include:

1. that he has had a minimum of at least five (5) years actual, practical working experience in the plumbing and pipe fitting industry.
2. That he is of good moral character.
3. That he passes a satisfactory examination as to his skill and ability as a Building and Construction Trades journeyman, conducted by the Examining Committee of the Building and Construction Trades Local Union or the Building and Construction Trades Branch of a Combination Local Union.”

3. There was, at the time, no provincial certification in effect for plumbers and steam fitters – only municipal licensing requirements. Local 46, however, had, at least since 1956, set its own examination pursuant to section 158 of the Constitution. When, at a later date, provincial certification came into force, the only effect given to it by Local 46 was to accept it as proof of an applicant’s working experience, as required by paragraph 1 of section 158, so that he qualified to write the Local’s examination. Because working in the high-rise residential sector tended to be of a repetitive and accordingly less-complicated nature than that which might be encountered in the institutional, commercial and industrial sector, Local 46 found that a number of the tradesmen in the “new” sector were not qualified to pass the Local’s entrance examination.

4. A second problem of concern to the officers of Local 46 was that they felt it would be necessary to be able to offer contractors in the high-rise residential sector a collective agreement with rates somewhat lower than those established for the institutional, commercial and industrial sector, in order to make voluntary recognition more attractive to such contractors.

5. Accordingly, Local 46 applied for and received approval from the General President to set up an Organizing Division for the residential sector with special dispensation in regard to the entrance examination and initiation fee. The normal initiation fee, then \$51.00, was reduced to \$26.00 for the purposes of this Division. More importantly, applicants who could prove at least *some* field experience in the trade would be accepted into membership but only in the Organizing Division. The authority for this special arrangement was set out in the union's constitution, which, as of 1966, read as follows:

"Sec. 91. The General Officers are empowered to institute in existing Building and Construction Trades Local Unions or Combination Local Unions divisions for organizing in the Refrigeration or Speculative Housing and Residential branches of the plumbing and pipe fitting industry. They are also empowered to set up any and all rules and regulations, including initiation fees and dues necessary for membership requirements. Building and Construction Trades Local Unions or Combination Local Unions may set up such divisions upon application to, and approval by, the General Officers."

6. The original concept was that commercial members of the union would be assigned by the union's hiring hall to commercial work, and the residential (or organizing) members to residential work. However, under its commercial collective agreements, the union normally had 72 hours to fill an employer's request for a tradesman, before the employer was entitled to fill his needs on his own. Rather than have the employer hiring from off the street, therefore, the practice of Local 46, when the demand for commercial workers was such that no commercial members were available to fill all of the employers' requests, was to assign a residential member to the project.

7. During the period 1965 to 1970, from 1,000 to 1,100 persons were admitted to Local 46 as "residential" members. Any of those subsequently wishing to transfer into "commercial" (or regular) membership could do so at any time, provided only that they paid the difference in the initiation fee, and successfully sat the examination set by the Examining Committee. To date some 75% of those 1,000 to 1,100 originally admitted as residential members have transferred into the commercial division. None have done so without passing the entrance examination, except for those, in accordance with the U.A.'s constitution, who have completed the government's apprenticeship program.

8. The evidence further establishes that negotiations for the commercial and residential sectors are carried on separately by Local 46, with the union deliberately settling the commercial contract first, since that is the sector in which it has the greatest bargaining strength. Through the years the differentials in the two collective agreements which originally existed respecting wage rates and overtime have been eliminated, so that the residential sector has now achieved parity with the commercial. When it comes to ratification of tentative settlements, Local 46 gives notice of the meeting, for a commercial contract, to all its commercial members, and, for residential contracts, to all its residential members. In addition, members of one sector who happen at the time to be working in the other sector, according to the records maintained by the Local's dispatch office, are also given notice when the contract in that other sector is being ratified.

9. With respect to job assignment, there is in the dispatch office for Local 46 a board

on which is posted the names of commercial members only. The names go on the board, and are referred out, strictly in the order in which members notify the office that they are looking for work. Referrals for residential work are handled in the same way, except that there is no posting of names on a board, the reason being, it was explained, that so few requests for men are received in the residential sector. It would appear that contractor's needs for men in that sector are filled almost exclusively by direct solicitation. The vast majority of requests for contractors occur in the commercial sector, and, as indicated at the outset, the respondent does not dispute that clear priority on such requests is given to its commercial members. Indeed, until recently, when a residential member was referred to a commercial job because of the unavailability of any commercial members of the Local, he was required to sign a "temporary transfer" card, acknowledging that he could be bumped from that job by a commercial member on one day's notice.

10. The complainant, Mr. Joseph Neblett, joined the respondent trade union in October 1966, through the Residential or Organizing Division. It appears that from the time he joined Local 46 until sometime in 1970 he was referred by the union exclusively to jobs in the commercial sector. After 1970, Mr. Neblett failed to receive any further referrals from Local 46, and was forced to find work outside of the Toronto area. He did so until sometime in 1976. He has since returned to Toronto, and registered for work with the union's dispatch office. To date, however, he has not been referred to any jobs by the union. On one occasion in particular, he had spoken to Mr. Bill Howard, the respondent's Business Manager, about upcoming work on Gulf Oil project in Port Credit. However, unlike in the sixties, there was insufficient commercial work in the Toronto area to provide full employment for all of the Local's commercial members. Accordingly, when Mr. Howard discovered that Mr. Neblett was only a residential member, he made it clear to Mr. Neblett that he would not be referring him to the Gulf Oil job. Although not germane to the present complaint, this refusal caused Mr. Neblett (who is black) to file with the Human Rights Commission a separate complaint which was investigated and dismissed.

11. Mr. Neblett acknowledged in his evidence that he knew at the time of joining the respondent trade union that he was entering the Organizing Division only, and that there would be a preference on commercial jobs for those members who were in the commercial section of the union. As he stated: "That's what it was set up for". Mr. Neblett took a refresher course at Central Tech, under the sponsorship of the respondent trade union, in 1970, and appears to have qualified for the provincial certification in 1973. He testified that when he joined the respondent, he was told that his entrance into the Organizing Division was a "temporary thing", and that he could go on to the commercial section after he wrote the examination. His position, both in the various discussions preceding the filing of his complaint, as well as in his testimony before the Board, appears to have been that, having received his provincial certification, he had "taken the examination". When asked on cross-examination to explain exactly what it was about the union's system that he felt was unfair, Mr. Neblett responded simply that the union "didn't call me - any individual would blame the authorities".

12. In addition to the referral problem, counsel for the complainant took the position that the manner of negotiating for the two sections as well as the criteria used for giving notice of ratification meetings, were in themselves violations of section 60 of the Act. It should be noted, however, that section 60 refers to employees in a bargaining unit, and this requirement has been decided by the Board to be mandatory for the section to apply (see the *Arthur*

Joseph Roberts case, [1979] OLRB Rep. March 169. This complaint was filed on November 7, 1979, and while the Board ruled that the complaint, because of its continuing nature, could be proceeded with, such a ruling does not give to the complaint an indefinite degree of retroactivity. There was no evidence whatever to suggest that the complainant had been an employee in a bargaining unit covered by a collective agreement at any time in the recent past, and accordingly any allegations of a violation of section 60 of the Act must be dismissed. The Board would note in passing, however, there was no evidence before it to suggest that the ratification procedure was being applied in a manner that was arbitrary, discriminatory or in bad faith. As for the method of negotiating the two contracts, the respondent's success in achieving for the residential section parity with the commercial section, in the Board's view, speaks for itself.

13. The primary thrust of the complaint, however, pertains to the practice of the respondent of granting priority to commercial over residential members in the selection or referral of men to commercial jobs. The respondent submitted that this branch of the complaint must fall as well, on the technical basis that the complainant had failed to prove that such selection or referral was "pursuant to a collective agreement". Again, section 60a provides:

"60a. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith."

The respondent is correct that the application of this section depends upon the selection or referral being done pursuant to a collective agreement (see the *Menacho* case, [1979] OLRB Rep. July 675). It is also true that the complainant did not file a copy of any collective agreements in this matter. The respondent, however, referred at various points in its evidence to the need to supply men within 72 hours of a contractor's request pursuant to the terms of the collective agreement. Accordingly, the Board finds that the respondent has admitted the fact which is a condition precedent to the application of this section.

14. The complainant maintains that the mere existence of two classes of employees within Local 46's membership, and in particular the preferential treatment of one class over the other in its referral practices, must necessarily create a conflict of interest which can only be resolved by acting towards one group in a manner which is arbitrary, discriminatory or in bad faith. In the Board's view, however, whether that ultimate conclusion is justified depends on the basis upon which the respondent distinguishes between the two classes. Here the distinction is simply between those who have passed the respondent's internal entrance examination, and those who have not.

15. Counsel for the complainant argues that the examination is itself arbitrary, in that residential members who have never passed the examination are nonetheless assigned to commercial projects when the need arises. He argues further that the examination is no more than a device initiated by the respondent to protect the preferential status of those persons who joined as members prior to 1966 – the "old boys", as counsel referred to them. In response to all of this, the Board notes that the respondent's practice of requiring persons whom it is prepared to admit as members to pass an examination of its own pre-dates the birth of the Organizing or Residential Division by at least ten years. There is no evidence be-

fore the Board to suggest that the examination has subsequently been amended to make it purely arbitrary in nature. Certainly an organization such as the respondent is entitled to promote the highest possible standard of quality amongst its membership by developing and applying in a uniform manner its own set of qualifying examinations, quite apart from the level of competence demanded by provincial authorities. This laudable desire on the part of the respondent is not inconsistent with its practice of referring to commercial work residential members when the demand for tradesmen exceeds the number of commercial members available. At such times, the respondent is, from the respondent's point of view, simply providing "the best man available".

16. At the same time, the opportunity for these less-qualified individuals to join and have the protection of the respondent, as well as to be referred to commercial work when a surplus of such work existed, has clearly been of benefit to such individuals, including the complainant Mr. Neblett. Having applied for and been granted membership in the respondent with full knowledge of the restrictions on its terms, and having enjoyed the additional benefits during the times that the volume of commercial work made them available, it is not now open to Mr. Neblett to complain about the arrangement. Neither is it open to Mr. Neblett to decide for himself what he must do to prove his qualifications as a "full" or commercial member. He is governed by the rules of his Association like any other member who chooses to join, and those rules, as embodied in the Constitution, define the examination which Mr. Neblett must pass in order to qualify as a commercial member. If Mr. Neblett still wishes to become a commercial member of his union, he need only follow the path of all those who have gone before him.

17. This complaint is hereby dismissed.

2456-79-R 2457-79-R United Food and Commercial Workers International Union, AFL-CIO-CLC, Applicant, v. **Wellington Mushroom Farm, A** Division of Campbell Soup Company Ltd., Respondent.

Agriculture – Employer operating mushroom growing business – Business akin to industrial enterprise rather than agriculture – Whether employed in agriculture

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members C. A. Ballentine and C. G. Bourne.

APPEARANCES: *Harold F. Caley and Kevin Corporon for the applicant; C. G. Riggs, D. A. Gendron, P. M. Barkla, H. E. Divine and J. H. Grisdale for the respondent.*

DECISION OF VICE-CHAIRMAN R. O. MACDOWELL AND BOARD MEMBER C. G. BOURNE; May 22, 1980.

1. This is an application for certification.

• • •

6. The respondent contends that the employees affected by this application are “employed in agriculture” and are therefore excluded from *The Labour Relations Act*. The applicant argues that the respondent’s mushroom growing operation is a manufacturing facility, and should not be regarded as an agricultural endeavour. In order to understand the force of both of these arguments, it will be necessary to examine the respondent’s operation in some detail. It should be noted, however, that unless the respondent’s employees are excluded from *The Labour Relations Act*, the applicant union would be entitled to certification without recourse to a representation vote. The overwhelming majority of the respondent’s employees have indicated their desire to engage in collective bargaining, and have chosen the applicant union as their bargaining agent.

7. The respondent’s operation is located on a 227 acre plot of land in Prince Edward County near Picton, Ontario. The actual growing of the mushrooms takes place in a large, single storey building constructed of concrete blocks. The building has a floor area of some 136,000 square feet, and resembles a factory, or warehouse, with an adjacent parking lot. The property was acquired, and the building constructed, solely for the purpose of mushroom growing. It has no other use; nor are the respondent’s employees engaged in any other activity. All of the employees work at the one location, producing and packaging mushrooms grown by the respondent. There is no involvement with mushrooms grown elsewhere.

8. Mushrooms are grown in a material called “compost” which is a mixture of hay, straw, corn cobs, gypsum, commercial fertilizer, and sometimes horse manure. Except for a small quantity of hay which is grown on the respondent’s land by local farmers working on a sub-contract basis, all of the ingredients for the compost are purchased elsewhere. The various materials are assembled in huge piles (8’ x 8’ x 400’) on concrete slabs outside the plant, where they are mixed with water and left to stand for about two weeks. The concrete slabs are heated by steam pipes beneath the surface and the material is turned, and mixed periodically to increase exposure to the air. At the end of the two week period the compost is taken inside the building by a front-end loader, and dumped into a self-emptying hopper, connected to a conveyor system. This, in turn, dumps the compost into a series of shallow trays, approximately 5 feet long and 4 feet wide, which are then stacked automatically.

9. From the “tray line”, the trays are taken by a stacker, to a dark, temperature controlled, room holding about 480 trays. The temperature is raised to 150 degrees (Fahrenheit) and, from time to time, the room is infused with steam. This “pasturization process” kills certain harmful bacteria and fungi, and encourages the growth of beneficial ones. The material is allowed to “condition” at lower temperatures for about five days, so that these beneficial organisms can grow. The trays are then returned to the tray line, where peat moss is mechanically added, the trays are levelled, and mushroom “spawn” (i.e. seed) are automatically injected. All of these operations take place on a moving conveyor line, similar to that used in assembly line factory operations.

10. Once the mushrooms are planted, the trays are taken by fork lift to the “spawn run room” where, again, the temperature is controlled and monitored. This is where the initial growing takes place. After about 14 days, the trays are moved to one of 14 dark, humid, temperature controlled, “growing rooms”. Here they are stacked six high. Each growing room holds 468 trays, and has a catwalk to provide access to the higher trays.

11. In about 10 days the mushrooms are ready for “harvest”. The harvesters go into the room, pull the mushroom out of the ground, cut the root, then sort the roots and mushrooms. The only tool used is a knife.

12. Following the harvest, the spent compost is stock piled, and either sold to local gardeners, or removed. The rooms are then chemically cleaned in preparation for the next cycle. The respondent’s facility operates on a continuous production basis with a five-week cycle.

13. About half of the mushrooms grown by the respondent are shipped by common carrier to the respondent’s soup manufacturing plants, where they become an ingredient in various processed food products. Most of the rest of the mushrooms are packed in smaller containers and sold to retail food stores. A few of the mushrooms are sold locally to members of the public who visit the respondent’s location.

14. The marketing of mushrooms is similar to that of other foodstuffs, although the product is not subject to specific marketing legislation. Mushrooms are treated in the same manner as other “agricultural” products. Both federal and provincial taxing authorities regard the respondent’s operation as “farming”.

15. The Wellington Mushroom Farm is a wholly owned Division of Campbell Soup Company Limited (“Campbell’s”) and, as has already been pointed out, Campbell’s provides a market for about fifty per cent of the mushroom crop. The employees working in the mushroom operation have terms and conditions of employment which are virtually identical to those of other Campbell’s employees. They have a Campbell’s employee identification card and number; they are paid every Thursday by cheque from Toronto; and income tax, unemployment insurance, and Canada Pension Plan contributions are deducted from their gross salary. The company provides sickness, accident and hospital insurance, life insurance, and payments to the workmen’s compensation fund. There is an employee saving and stock option plan, which permits employees to purchase Campbell’s shares, as well as certain other investments. There is also a retirement, and pension program. These plans are available to the employees in the mushroom operation on the same basis as to the other Campbell’s employees.

16. The internal organization of the mushroom “farm” resembles that of an industrial plant. There is a plant manager and the enterprise is divided into departments, each of which has its own unit manager. There is an office, clerical and marketing staff established in offices on the premises. The employees work on a rotating shift basis, punching time cards as they begin, or end, their working day. The day shift begins at 8:00 a.m. and ends at 4:30 p.m. There is a short coffee break in the morning and the afternoon, as well as a one-half hour lunch break. Inside the plant, there is a cafeteria with vending machines, a microwave oven, tables, chairs and a telephone.

17. Employees who have passed their ninety day “probationary period” receive nine paid “statutory holidays”. Employees working overtime are paid at time and one half. There are regularly scheduled vacations, provisions for bereavement pay and jury duty, and a regularized disciplinary system. There is a joint employer-employee safety committee and a handbook of “plant rules” which are communicated to employees. The managerial structure – from “plant manager” down to “foreman” is reminiscent of a manufacturing op-

eration. Indeed, in recent years, the company has compared its wages to other industrial employers in the area, (Bata Shoe, Proctor Silex, Quaker Oats, etc.), and has indicated to its employees that, in its view, its wages are competitive with these enterprises.

18. We are satisfied that there is no material difference between the employer-employee relationship in the respondent's mushroom operation, and that of Campbell's manufacturing employees. We are further satisfied that the respondent's production process closely resembles that of a manufacturing operation, and that the economic position of the respondent's employees is similar to that of an industrial worker. Ordinarily, one does not consider a machine repairman, or a fork lift operator, to be engaged in an agricultural endeavour; and whatever one's conception of "farming" may be, it does not usually include a "plant" with adjacent parking lot, assembly line methods of production, rotating shift systems, time clocks or a sophisticated corporate personnel policy. The question before the Board, however, is whether the respondent's employees nevertheless "are employed in agriculture" within the meaning of section 2 of *The Labour Relations Act*.

19. The term agriculture refers to the art or science of cultivating the ground, and includes, in a broad sense, the production of plants and animals useful to man. Agriculture encompasses the growing of crops, and the primary production of food, in all its many forms. Agricultural activities can take a variety of forms depending on the characteristics of the particular agricultural product and its market.

20. The terms "agriculture" and "farming" inevitably conjure up (in the minds of non-farmers at least,) an image of pastoral tranquility – the sturdy husbandman, settling the land and tilling the fields with his family. Historically the farm has been regarded as an institution, not merely a place of employment. The small farmer has been thought to personify the virtues of hard work, enterprise, independence and self-sufficiency. Within this agrarian pre-industrial context, collective bargaining seems entirely out of place.

21. These pastoral notions are firmly imbedded in the imagination, and suggest a marked, but entirely erroneous, distinction between agriculture and the modern industrial world. The reality is that, in recent years, there has been a rapid shift from an industry characterized by small scale family owned operations, to one increasingly dominated by large, complex, commercial organizations, often taking corporate form. Technological change has revolutionized the farming business. Economies of scale in production and marketing require consolidation, and increasing investment in sophisticated equipment. These economic pressures have prompted the emergence of "agribusiness", and, as in the present case, the development of the "corporate factory farm".

22. The union contends that the agricultural exclusion first appeared in the late 1940's, and is based upon a traditional view of farming operations. The union argues that the legislature did not envisage the growth of agribusiness, and that accordingly, the term "agriculture" should be restricted to organizational forms more closely resembling those which were in existence at the time the exclusion was first drafted. In the union's submission, only a narrow interpretation of the term "agriculture" will promote the remedial purposes of the legislation. The company, on the other hand, argues that the agricultural exclusion has been preserved each time the legislation was re-enacted or amended, and that in any event, it is not unusual for the legislature to use general language which may subsequently embrace activities which were not envisaged *ab initio*. Indeed, this may be the very reason why such

general language is used. If the scope of the statute is inappropriate or creates an anomaly, it is up to the legislature to amend it; but until it does so, the words must be given their ordinary meaning. It might be observed, moreover, that the meaning of general terms such as “agriculture” or “farming” may change over time – as was recognized by Egbert J. in *Hill v. Lethbridge Municipal District No. 25*, (1955), 14 W.W.R. (N.S.) 577 at 588:

“... as in the case of many words, the word ‘farmer’ is a good exemplification of the fact that over the course of years the meaning of words may alter ... With the application of modern and recent scientific methods and systems to agriculture, it is hardly to be expected that such words as ‘farm’, ‘farmer’, ‘farming’, and ‘agriculture’ would bear exactly the same meanings as they bore half a century ago ... these terms have, over the years, acquired a different and wider meaning than they had in the past ... so that farming ... now includes many ancillary and incidental activities that our ancestors never dreamed of.”

23. The trade union’s position is based upon a purposive interpretation of the statute, and an assertion that there is no logical rationale for excluding employees engaged in agribusiness. These employees are subject to precisely the same economic forces as employees in other sectors of the economy and, in the union’s submission, there is no reason why they should not have the same rights and protections as other employees. Counsel reviewed the various arguments which might support the exclusion of farm labourers from the protection of labour relations legislation, (see also: K. Neilson and I. Christie; *The Agricultural Labourer in Canada: A Legal Point of View*; [1977] Dalhousie Law Journal 330), and noted that few of these arguments are applicable to “agribusiness”, and none of them are relevant to the respondent’s operation. There being no apparent collective bargaining rationale for excluding the respondent’s employees from the legislation, the applicant submits that the legislature could not have intended this result.

24. Counsel referred to a number of features of agricultural markets which, from various points of view, might make collective bargaining inappropriate. Many farm products are seasonal, and perishable – thus giving a farm workers’ union inordinate bargaining leverage in the event of industrial conflict. The workforce may be made up largely of seasonal employees, who travel significant distances, to work for a short period of time. Collective bargaining would be difficult to establish, and perhaps illusory, because of their transitory relationship with any one employer. Conversely, it can be argued that unions have no place in agriculture because of the close involvement of farm employees with the employer’s family. Workers may live with the family, as well as work with them. Problems may arise in determining whether members of the family are employed within a potential bargaining unit. Some argue that the unique climatic, and seasonal nature of the industry require maximum flexibility in the disposition of labour so that fixed terms and conditions of employment embodied in a collective agreement (or legislative standards) are inappropriate. Economic vulnerability may also be a factor, if it is feared that farmers are in a tenuous economic position and the impact of collective bargaining would inevitably drive them out of business. Finally, one cannot overlook the nineteenth century image to which we have already referred. If one accepts this image as the reality, one might well conclude that collective bargaining is antithetical to established rural values, and social structures.

25. None of these arguments apply to an integrated corporate operation such as that

run by the respondent. There is no close involvement with the family farm. The production process is not seasonal, but rather, resembles a production cycle. The labour force is neither casual nor transitory. The operation is of considerable size, employing close to 200 employees in a single location with a "factory atmosphere"; and the company is much less economically vulnerable than many other employers to which *The Labour Relations Act* applies. The respondent has found it convenient to treat the employees on its mushroom farm in precisely the same way as its employees in its manufacturing facilities. Their terms and conditions of employment are virtually identical. The union argues that it would be illogical and inequitable to adopt an interpretation which allowed one group of employees to establish their terms and conditions of employment through collective bargaining, while denying that opportunity to their fellow employees in a related part of an integrated undertaking. Essentially, both operations are "factories" operating in an industrial environment. The union contends that this environment is completely artificial and entirely isolated from the natural environment. The production of mushrooms uses neither sun nor rain. Light, moisture, warmth and even the "soil" in which the mushrooms are grown, are produced artificially. It is the manufacturing character of the process which dictates the factory form of organization, and a typical "industrial" employer-employee relationship.

26. The respondent's reply is both simple and factual. Mushrooms are not manufactured. They are grown. Seeds are planted and are grown by natural processes. It is this natural act of growing which is essential to the respondent's operation, and characterizes it as "agricultural". The environment is rigidly controlled – just as it would be in a greenhouse; but fundamental to the production of mushrooms is a natural organic growing process. The respondent's operation is highly mechanized, but this is typical of modern agriculture, and does not alter the character of the undertaking.

27. None of the cases to which we were referred are precisely on point; however, their general thrust supports the respondent's position. In *Cedarvale Tree Services Limited v. Labourers' International Union Local 183 et al*, [1971] 3 O.R. 832, the Ontario Court of Appeal, (affirming the views of Wright, J. in the High Court) suggests that terms such as "horticulture" or "agriculture" should be given their "ordinary" rather than a special "collective bargaining meaning". In *Re Ontario Mushroom Company Limited et al and Learie et al*, (1977), 15 O.R. (2d) 77, the majority of the Divisional Court adopted this approach, and found, *inter alia*, that mushrooms are generally understood to be "vegetables". That case involved a decision of a referee under *The Employment Standards Act* in which, as in the present case, the uncontradicted evidence suggested that mushroom growing is commonly regarded as a form of farming which produces an edible product marketed in the same manner as other vegetables. In *Calvert – Dale Estates Limited*, [1971] OLRB Rep. Feb. 48, this Board found that the stationary engineers who operated a boiler system used to heat greenhouses and to pasturize and sterilize the soil, were employed in "horticulture". The environment in which the plants grew was artificially controlled, but the overall nature of the employer's operation was regarded as "horticultural" even though the functions performed by the employees were not unique to the agricultural sector. Similarly, in *Spruceleigh Farms*, [1972] OLRB Rep. Oct. 860, an employer, for efficiency reasons, had sub-divided the life cycle of the chicken into three distinct stages, each of which was carried on in a different location. The truck drivers who transported the chickens from the "breeding farm", to the "hatchery", and then to the "growing farm", were held to be employed in agriculture – even though, again, the functions that they performed were not unique to the agricultural sector. The respondent's organization was characterized as a whole, and the role of the truck drivers was regarded as an integral part of that undertaking.

28. *Calvert – Dale Estates Limited*, and *Spruceleigh Farms Limited*, both suggest that a highly artificial or controlled environment, is not sufficient, in itself, to remove an employer's operation from the agricultural sector; nor is it significant that some of the functions performed by the employees are not usually, or necessarily, associated with the cultivation of the soil. It is sufficient if the overall nature of the employer's operation is "agricultural", and the functions performed by the challenged employees are an integral part of that operation. These cases may be contrasted with *Federal Farms Ltd.* 63 CLLC ¶16,292 or *Ontario Tree Fruits Co-op Ltd.* 62 CLLC ¶16,235, where the employer's business was clearly separate, severable, and ancillary to a farming operation.

29. The facts of this case provide a striking illustration of the degree to which economic and technological changes have transformed the agricultural sector. The respondent has accommodated these forces by adopting an "industrial" mode of production and a "factory" form of organization which does not differ in any material respect from a typical manufacturing plant. Indeed, the respondent's mushroom factory employees are in essentially the same position as the employees in its food processing operation, and many of their terms and conditions of employment are identical. The evidence even suggests a single unified and well-developed personnel policy for both groups of employees. Because the respondent is a vertically integrated corporate entity which produces on a 5 week cycle and "consumes" fifty per cent of its own primary production, it cannot even be said that it is subject to the traditional vagaries of the agricultural product market. We accept the applicant's contention that there is no "industrial relations basis" for denying the respondent's employees the right to bargain collectively, nor can we discern any tangible prejudice to the respondent if the employees in its "mushroom factory" were entitled to the same statutory rights as their fellow employees in its soup factory. The fact remains however, that *The Labour Relations Act* excludes "agricultural" employees, and it is clear that: mushrooms have been held to be a "vegetable"; mushroom growing is regarded (at least by regulatory bodies) as a "farming" activity; and mushrooms are marketed in the same manner as other farm products. There is a compelling argument for a review of the legislation insofar as it excludes individuals in situations similar to that of the respondent's employees; nevertheless, we are satisfied that the words "employed in agriculture" are broad enough, in their ordinary meaning, to include persons engaged in the growing of mushrooms, in the manner practiced by the respondent. The respondent is engaged in an agricultural endeavor. Its employees are excluded from *The Labour Relations Act*, and do not have the right to bargain collectively within the framework of that statute. Accordingly, this certification application must be dismissed.

DECISION OF BOARD MEMBER C.A. BALLENTINE:

1. I agree with the majority decision's review of the evidence and the findings of fact set out there. In particular, I emphasize the characterization of the Respondent's operations, as set out in paragraph 18 of the majority decision. However, in dismissing this application on the basis that the employees are exempt from the Act, the majority decision has adopted an interpretation of the Act which is not, in my view, in accord with the purposes of the legislation.

2. The majority decision correctly points out that the agricultural exemption is properly applicable to the "family farm" situation. The legislature could not have intended to exclude from collective bargaining persons whose jobs and work environment are indistinguishable from persons employed in industry. The only real difference between the

employees of the Respondent and the employees of an employer engaged in manufacturing is the end product of their work. The Respondent's employees produce mushrooms while other employees in the same geographic area, with whom the Respondent has compared wages (see paragraph 17 of the majority decision) produce shoes, appliances, or cereal. Surely it cannot be said that it was the intent of the legislature to deprive employees of the right to engage in collective bargaining simply because they work in a mushroom "factory" rather than a shoe factory.

3. In my opinion, the Board ought to be at the forefront of expanding the scope of *The Labour Relations Act*. The agricultural exemption contained in the Act ought to be narrowly interpreted. The Board must give meaning to the legislation with a view to providing employees with the opportunity to engage in collective bargaining if that is their wish. If the Board exceeds its jurisdiction by giving this opportunity to the Respondent's employees who have, by an overwhelming majority, demonstrated their desire to engage in collective bargaining, then the courts will no doubt tell us. In my opinion, the Board ought to have tested the extent of the agricultural exemption in this case.

4. It may well be that the majority's interpretation of the Act is reasonable and justified based on the existing cases. However, I would have dared to go further, otherwise, these 160 employees are deprived of the right to engage in collective bargaining. They must now await action by the legislature which ought to act to remove this obvious inequity in the statute.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1980

BARGAINING AGENTS CERTIFIED DURING APRIL

No Vote Conducted

0322-79-R: Canadian Union of Public Employees (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit #1: "all employees of the respondent at the Toronto-Dominion Centre, Toronto, save and except housekeepers, persons above the rank of housekeeper, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (306 employees in the unit). *(In conformity with the agreements of the parties)*.

Unit #2: "all employees of the respondent at the Toronto-Dominion Centre, Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except housekeepers, persons above the rank of housekeeper, office, clerical and sales staff." (3 employees in the unit). *(In conformity with the agreement of the parties)*.

1571-79-R: Canadian Union of Public Employees (Applicant) v. ABC Day Nursery and Kindergarten Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except secretary to the director, supervisors and persons above the rank of supervisor." (58 employees in the unit). *(Having regard to the agreement of the parties)*.

1878-79-R: Teamsters Local Union No. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. T.R.S. Food Services Ltd., (Respondent) v. Hotel & Restaurant Employees' & Bartenders' International Union (affiliated with the CLC) (Intervener).

Unit: "all employees of the respondent in St. Catharines, Ontario, save and except supervisors, persons above the rank of supervisor, chefs, office and clerical workers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (57 employees in the unit).

1928-79-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Foodex Inc., (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Belleville, Ontario, save and except managers and persons above the rank of manager." (43 employees in the unit).

1995-79-R: The Hotel and Club Employees' Union, Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union, (AFL-CLC-CIC) (Applicant) v. Hotel Canadiana (Respondent).

Unit: "all employees of the respondent at the Hotel Canadiana, Agincourt, Ontario, save and except Executive Chef, Supervisors, Department Heads, those above the rank of Executive Chef, Supervisor, Department Head, Office and sales staff, accounting staff, audit department staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (48 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2033-79-R: Canadian Union of United Brewery, Flour, Cereal Soft Drink and Distillery Workers, Local Union 304 (Applicant) v. Fortier Beverages Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Cochrane, Ontario, save and except supervisors, persons above the rank of supervisor, sales manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (19 employees in the unit).

2083-79-R: The Canadian Union of Public Employees (Applicant) v. St. Lawrence Estate (Respondent).

Unit: "all employees of the respondent in Cornwall, Ontario, save and except supervisors, persons above the rank of supervisor, secretary and part-time secretary to the Administrator, graduate and registered nurses, technical personnel, persons regularly employed for not more than 24 hours per week and persons covered by an existing collective agreement between the respondent and C.U.P.E., Local 1919." (27 employees in the unit). (*On the agreement of the parties*).

2113-79-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Barbecon, Inc., Fine Papers London Division (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period." (10 employees in the unit).

2114-79-R: Canadian Union of Public Employees (Applicant) v. Corporation of the City of Barrie (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the City of Barrie, save and except City Administrator, Administrative Assistant, City Engineer, Engineering Field Supervisor, all professional engineers employed in an engineering capacity, Director of Parks and Recreation, Deputy Director of Recreation, Superintendent of Park Planning and Construction, General Foreman of Parks and Forestry, General Foreman of Arenas, Superintendent of Program Services, City Clerk, Deputy City Clerk, Assistant to the City Clerk, City Treasurer, Deputy City Treasurer, Chief Accountant, Director of Planning and Development, Superintendent of Public Works, Public Works Chief Clerks, Administrative Supervisor, Chief Building and Plumbing Inspector, Social Services Administrator, City Planner, Secretary to the Mayor, Secretary to the City Administrator, Secretary to the City Engineer, Secretary to the Fire Chief, Office Co-ordinator (Recreation), Office Secretary (Recreation), Traffic and Parking Supervisor, Foreman – Public Works, Operations Supervisor, Planning and Development Co-ordinating Secretary, Pollution Control Supervisor, Zoning Administrator, Assistant Social Services Administrator, persons regularly employed for not more than 24 hours per week and students employed during the summer vacation period." (99 employees in the unit). (*Having regard to the agreement of the parties*).

2173-79-R: United Food and Commercial Workers International Union, AFL-CIO-CLC., (Applicant) v. Bright Canning Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent employed at 5900 Thorold Stone Road, Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, seasonal employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (23 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2178-79-R: United Food and Commercial Workers International Union Local 725 (Applicant) v. Commonwealth Holiday Inns of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Sudbury, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the Innkeeper, security staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods.” (66 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2211-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. King Hydraulic Power Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Woodstock, Ontario, save and except foremen, persons above the rank of foreman, office, sales and engineering staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods.” (50 employees in the unit). (*Having regard to the agreement of the parties*.)

2213-79-R: Amalgamated Clothing and Textile Workers Union – Toronto Joint Board (Applicant) v. Tuxedo Junction Limited (Respondent).

Unit: “all employees of the respondent in the City of Hamilton, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, sales and office staff, persons who regularly work less than 24 hours per week and students employed during the school vacation period.” (16 employees in the unit). (*Having regard to the agreement of the parties*).

2214-79-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494, 1007, 1410, 1425, 1595, 1669, 1916, and 2309, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ascot Millwrighting (Respondent) v. Association of Millwrighting Contractors of Ontario (Intervener).

Unit: “all millwrights and millwright apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except nonworking foremen and persons above the rank of foreman.” (19 employees in the unit).

2231-79-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. S.G. Christmas (Respondent).

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in Prince Edward County and the Townships of Lake Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

2244-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Sony of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, executive secretaries, salespersons, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (86 employees in the unit). (*Having regard to the agreement of the parties*).

2245-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Sony of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all warehouse employees of the respondent in Metropolitan Toronto, save and except assistant managers, persons above the rank of assistant manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (6 employees in the unit). (*Having regard to the agreement of the parties*).

2256-79-R: United Steelworkers of America (Applicant) v. Steetley Talc Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent in Timmins, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (14 employees in the unit). (*Having regard to the agreement of the parties*).
(*Bargaining Unit #2 – See Certification Dismissed, No Vote Conducted*).

2266-79-R: Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Glassec Industries Inc., (Respondent).

Unit: "all employees of the respondent at its plant in Cornwall, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in the unit). (*Having regard to the agreement of the parties*).

2273-79-R: Ontario Public Service Employees Union (Applicant) v. Art Gallery of Ontario (Respondent).

Unit: "all employees of the Art Gallery of Ontario in the Municipality of Toronto, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except security guards, benefits clerk and persons covered by subsisting certificates." (94 employees in the unit). (*Having regard to the agreement of the parties*).

2274-79-R: Service Employees Union, Local 204, AFL-CIO-CLC (Applicant) v. Arc Industries of Greater Niagara Association for the Mentally Retarded (Respondent).

Unit: "all employees of the respondent in Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, office staff and persons employed for less than 24 hours per week." (7 employees in the unit). (*Having regard to the agreement of the parties*).

2283-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Wajax UEC Limited (Respondent).

Unit: “all employees of the respondent at Markham, Ontario, save and except assistant foremen, persons above the rank of assistant foreman, office staff and those employees covered by a subsisting collective agreement between the respondent and U.A.W., Local 303.” (21 employees in the unit). *(Having regard to the agreement of the parties)*.

2284-79-R: Canadian Union of Public Employees (Applicant) v. Ottawa-Carleton Regional Residential Treatment Centre (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except co-ordinators, persons above the rank of co-ordinator, social workers, psychometrists, psychologists, recreologists, recreational specialists, office and clerical staff, maintenance personnel, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons employed in connection with an accredited course of studies.” (32 employees in the unit). *(Having regard to the agreement of the parties)*.

2285-79-R: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Nantucket Rebar Services (Respondent).

Unit: “all employees of the respondent working at 315 Nantucket Boulevard, Scarborough, Ontario, save and except foremen, persons above the rank of foreman and office and sales staff.” (11 employees in the unit). *(Having regard to the agreement of the parties)*.

2308-79-R: Canadian Union of Public Employees (Applicant) v. Strathaven Nursing Home Limited (Respondent).

Unit: “all employees regularly employed for not more than 24 hours per week save and except professional medical staff (including registered nurses and graduate nurses), supervisors, office and clerical staff and persons covered by a subsisting collective agreement and certificate dated July 17, 1980.” (25 employees in the unit). *(Having regard to the agreement of the parties)*.

2310-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Hein-Werner of Canada Limited (Respondent).

Unit: “all employees of the respondent in Ajax, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (46 employees in the unit). *(Having regard to the agreement of the parties)*.

2326-79-R: Ontario Public Service Employees Union (Applicant) v. Mini Skool Limited (Respondent).

Unit: “all employees of the respondent at Hamilton, Ontario, save and except office and sales staff, maintenance and cleaning staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (22 employees in the unit). *(Having regard to the agreement of the parties)*.

2327-79-R: United Steelworkers of America (Applicant) v. Heckett, Division of Harsco Corporation (Respondent).

Unit: “all employees of the respondent at the Steel Company of Canada, Lake Erie Development in

Haldimand-Norfolk Region, save and except foremen, persons above the rank of foreman, office and sales staff.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

2349-79-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicant) v. Harlin Contracting Div. of Pre-Din Co. Limited (Respondent).

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

2359-79-R: Service Employees Union, Local 204, Affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit: “all employees of the respondent at the Toronto Eaton Centre Shopping Mall, in the Municipality of Metropolitan Toronto, engaged in cleaning services, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.” (87 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2368-79-R: Service Employees Union – Local 201, Affiliated with Service Employees International Union AFL-CIO-CLC, (Applicant) v. Maitland Manor Limited (Respondent) v. Ontario Nurses’ Association (Intervener).

Unit: “all employees of the respondent at Goderich, Ontario, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, office staff, professional medical staff, registered and graduate nurses, physiotherapists, dieticians, and persons covered by subsisting collective agreements.” (23 employees in the unit). (*Having regard to the agreement of the parties*).

2371-79-R: Ontario Public Service Employees Union (Applicant) v. Mini Skools Ltd., (Respondent).

Unit: “all employees of the respondent at 1855 Jane Street, Weston, Ontario, save and except assistant supervisor, office and sales staff, maintenance and cleaning staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (10 employees in the unit). (*Having regard to the agreement of the parties*).

2372-79-R: Ontario Public Service Employees Union (Applicant) v. Mini Skools Limited (Respondent).

Unit #1: “all employees of the respondent at 370 Dixon Road, Weston, Ontario, save and except assistant supervisor, persons above the rank of assistant supervisor, office and sales staff, maintenance and cleaning staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (16 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at 370 Dixon Road, Weston, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant supervisor, persons above the rank of assistant supervisor, office and sales staff and maintenance and cleaning staff.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

2373-79-R: Service Employees Union, Local 204, Affiliated with AFL-CIO-CLC (Applicant) v. Royal Victoria Hospital of Barrie (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: “all employees of Royal Victoria Hospital of Barrie, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nurses, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office staff and persons covered by subsisting collective agreements.” (75 employees in the unit). (*Having regard to the agreement of the parties*).

2391-79-R: Labourers’ International Union of North America, Local 506, (Applicant) v. International Exposition Services Inc., (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

2403-79-R: Canadian Union of Public Employees (Applicant) v. Board of the Lake Erie Regional Library System (Respondent).

Unit: “all employees of the respondent at London, Ontario, save and except the Director, Secretary-Treasurer and Administrative Assistant to the Director.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

2404-79-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Design Craft Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all warehouse employees of the respondent in Metropolitan Toronto, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and persons covered by a collective agreement between the Exhibit and Display Association of Canada and the applicant dated September 1, 1978.” (8 employees in the unit).

2405-79-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q., (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 1426 London Road, in the City of Sarnia, save and except hostesses and persons above the rank of hostess.” (58 employees in the unit). (*Having regard to the agreement of the parties*).

2414-79-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Travellers School Transit Limited (Orillia Division) (Respondent).

Unit: “all employees of the respondent in Orillia, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (80 employees in the unit).

2419-79-R: Construction Workers Local 52 affiliated with Christian Labour Association of Canada (Applicant) v. Baron Electric Limited (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County

of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

2420-79-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Yonge-Ranleigh Investments Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

2430-79-R: Service Employees Union, Local 204, Affiliated with AFL-CIO-CLC (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit: “all employees of the respondent employed in cleaning services at Clarkwood Residence in Metropolitan Toronto, save and except supervisors, foreladies, persons above the rank of supervisor and forelady, office, clerical and sales staff.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

2437-79-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. Norsten Meat Packers Limited (Respondent).

Unit: “all employees of the respondent at Kitchener, save and except foremen, persons above the rank of foreman, office, buying and sales staff, persons employed for less than 24 hours per week and students employed during the school vacation period.” (27 employees in the unit). (*Having regard to the agreement of the parties*).

2441-79-R: Local Union 1465, United Brotherhood of Carpenters and Joiners of American (Applicant) v. Advance Tile and Floor Covering (Toronto) Limited (Respondent).

Unit: “all employees of the respondent engaged in the installation of resilient flooring in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

2442-79-R: The United Brotherhood of Industrial Construction, Maintenance and Service Workers of Ontario (Applicant) v. B.E.S.T. Mechanical of Elliot Lake Limited (Respondent).

Unit: “all employees of the respondent, within a radius of 35 miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

2453-79-R: United Steelworkers of America (Applicant) v. Commercial Aluminum, Division of In-dal Limited (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period.” (21 employees in the unit). (*Having regard to the agreement of the parties*).

2460-79-R: Alliance Employees' Union (Applicant) v. National Component, Public Service Alliance of Canada (Respondent).

Unit: "all employees of the respondent at 233 Gilmour Street, Suite 301, Ottawa, Ontario, save and except elected officers, Executive Secretary, Assistant Executive Secretary, Secretary to the Executive Secretary, Financial Advisor and Administrative Officer." (26 employees in the unit). (*Having regard to the agreement of the parties*).

2462-79-R: Christian Labour Association of Canada (Applicant) v. Sunnyview Nursing Home Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Registered Nurses and persons above the rank of registered nurse." (13 employees in the unit). (*Having regard to the agreement of the parties*).

00900-80-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Newman Bros. Co. Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a 50 mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0091-80-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494, 1007, 1410, 1425, 1592, 1669, 1916 and 2309, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Manitou Millwrights Limited (Respondent).

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in the county of Wentworth including part of Township of Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0105-80-R: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Lakehead Insulation & Plastics Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to a Pre-Hearing Vote

1860-79-R: Teamsters, Chemical, Energy and Allied Workers, Local Union No. 1552, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Emery Industries Limited (Respondent) v. United Rubber, Cork, Linoleum and Plastic Workers of America and its Local 446 (Intervener).

Unit: "all employees of the respondent in its business establishment, located in Etobicoke, Ontario, save and except foremen, supervisors, persons above the rank of foreman or supervisor, office staff, sales staff, research and development staff, engineering staff and students employed in the Analytical and Control Laboratory during the school vacation periods." (76 employees in the unit).

Number of names of persons on revised voters' list		76
Number of persons who cast ballots	73	
Number of ballots marked in favour of the applicant	57	
Number of ballots marked in favour of the intervener	16	

2101-79-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Panasonic Industries Canada Limited (Respondent).

Unit: "all employees of the respondent at its plant in Metropolitan Toronto, Ontario, save and except foremen and foreladies, persons above the rank of foreman or forelady, office and sales staff." (196 employees in the unit).

Number of names of persons on revised voters' list		194
Number of persons who cast ballots	191	
Number of ballots marked in favour of the applicant	116	
Number of ballots marked against applicant	75	

2239-79-R: United Steelworkers of America (Applicant) v. Electro Sonic Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff." (71 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		65
Number of persons who cast ballots	64	
Number of ballots marked in favour of applicant	39	
Number of ballots marked against applicant	22	
Ballots segregated and not counted	3	

2240-79-R: Service Employees Union, Local 204, Affiliated with AFL-CIO-CLC (Applicant) v. St. Joseph's Hospital, Brantford (Respondent).

Unit "all lay employees of the respondent in Brantford, who are regularly employed 24 hours or less per week, and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, student nursing assistants, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineers, stationary engineers, office staff and persons covered by subsisting collective agreements." (59 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		56
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant	22	
Number of ballots marked against applicant	10	
Ballots segregated and not counted	7	

2255-79-R: National Union of Independent Gas Workers (Applicant) v. Provincial Gas Company (Respondent) v. The United Electrical, Radio & Machine Workers of America (U.E.) and its Local 517 (Incumbent).

Unit: "all employees of the respondent working at or out of the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, inspectors, engineers, clerical and sales staff." (113 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		113
Number of persons who cast ballots	111	
Number of ballots marked in favour of Applicant	101	
Number of ballots marked in favour of Incumbent	7	
Ballots segregated and not counted	3	

2313-79-R: Graphic Arts International Union Local 12-L Toronto, Ontario (Applicant) v. Southam Murray Printing Limited (Respondent) v. Toronto Printing Pressmen & Assistants' Union Local No. 10, Subordinate to the International Printing and Graphic Communications Union (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto employed as journeyman pressmen, apprentice pressmen, press assistants and apprentices, save and except foremen, persons above the rank of foreman, office staff and persons covered by subsisting collective agreements." (23 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	18	
Number of ballots marked in favour of intervener	5	

2318-79-R: Labourers' International Union of North America, Local 506 (Applicant) v. Avenue Structures (Respondent) v. Provincial Conference of Ontario of the Operative Plasterers and Cement Masons International Association of United States and Canada on behalf of its Affiliated Local Union. 70 124, 151, 162, 344, 345, 598, 915, (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	1	

2412-79-R: Labourers' International Union of North America, Local 506 (Applicant) v. Pigott Construction Limited (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial, and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	0	

Applications Certified Subsequent to a Post-Hearing Vote

1878-79-R: Teamsters Local Union No. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. T.R.S. Food Services Limited (Respondent) v. Hotel & Restaurant Employees' & Bartenders' International Union (affiliated with the CLC) (Intervener).

Unit: "all employees of the respondent in St. Catharines, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, chefs and office and clerical workers." (57 employees in the unit).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots		11
Number of ballots marked in favour of applicant	10	
Number of ballots marked in favour of intervener	1	

2160-79-R: Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Applicant) v. Ingram and Bell Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff and students employed during the school vacation period." (50 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		59
Number of persons who cast ballots		59
Number of ballots marked in favour of applicant	36	
Number of ballots marked against applicant	23	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0835-79-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Kafko Manufacturing Limited (Respondent).

1638-79-R: Service Employees Union, Local 268 (Applicant) v. Domco Foodservices Limited (Respondent) v. Retail Clerks Union Local 409 (Intervener #1) v. Restaurant, Cafeteria and Tavern Employees Union, Local 254, of the Hotel and Restaurant Employees and Bartenders International Union (Intervener #2).

1639-79-R: Service Employees Union Local 268 (Applicant) v. Domco Foodservices Limited (Respondent) v. Retail Clerks Union Local 409 (Intervener #1) v. Restaurant, Cafeteria and Tavern Employees Union Local 254, of the Hotel and Restaurant Employees and Bartenders International Union (Intervener #2).

2050-79-R: Christian Labour Association of Canada (Applicant) v. Chatham Horticulture Society (Respondent).

2156-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bono General Construction Limited (Respondent).

2171-79-R: United Food and Commercial Workers International Union, AFL-CIO (Applicant) v. Bright Canning Company Limited (Respondent) v. Group of Employees (Objectors).

2172-79-R: United Food and Commercial Workers International Union AFL-CIO (Applicant) v. Bright Canning Company Limited (Respondent) v. Group of Employees (Objectors).

2174-79-R: United Food and Commercial Workers International Union AFL-CIO (Applicant) v. Bright Canning Company Limited (Respondent) v. Group of Employees (Objectors).

2187-79-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. Cummings Signs of Canada Limited (Respondent) v. Group of Employees (Objectors). (42 employees in the unit).

2256-79-R: United Steelworkers of America (Applicant) v. Steetley Talc Limited (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent at its mine site located in Penhorwood Township, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in the unit).

(Bargaining Unit #1 – See Applications Certified – No Vote Conducted.)

2330-79-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Superior Sanitation Services Inc., (Respondent) v. Labourers International Union of America, Local 1267 Oil & Gas Technicians, Service, Domestic & General Workers (Intervener). (106 employees in the unit). *(Having regard to the agreement of the parties).*

Certifications Dismissed Subsequent to Pre-Hearing Vote

1573-79-R: International Union of Electrical Radio and Machine Workers, AFL, CIO, CLC (Applicant) v. Canadian General Electric Company Limited (Respondent) v. International Federation of Professional and Technical Engineers, AFL, CIO, CLC (Intervener).

Unit: "all buyers and value analysts employed by Canadian General Electric Limited in the City of Peterborough, Ontario, save and except those persons of supervisory positions, persons above the rank of supervisory position, students employed during the school vacation period, students employed on a co-operative training programme and persons covered by subsisting collective agreements." (28 employees in the unit). *(Having regard to the agreement of the parties).*

Number of names of persons on list as originally prepared by employer		28
Number of persons who cast ballots		28
Number of segregated ballots cast by persons whose name appear on voters' list	28	

2189-79-R: Association of Allied Health Professionals Ontario (Applicant) v. Riverside Hospital of Ottawa (Respondent) v. Ontario Public Service Employees Union (Intervener #1) v. Canadian Union of Operating Engineers and General Workers (Intervener #2).

Unit: "all paramedical employees of the respondent in Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period and employees covered by subsisting collective agreements." (38 employees in the unit). (*clarity note*).

Number of persons on list as originally prepared by employer		41
Number of names of persons on revised voters' list		35
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	18	

2264-79-R: Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Applicant) v. Arwen Flooring Ltd., (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit). (*clarity note*).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots		9
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener	5	

2319-79-R: Labourers International Union of North America, Local 506 (Applicant) v. Eastern Construction company Limited (Respondent) v. Provincial Conference of Ontario of the Operative Plasterers and Cement Masons International Association of United States and Canada on behalf of its affiliated Local Union. 70 124, 151, 162, 344, 345, 598, 915 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener	1	

2328-79-R: Labourers' International Union of North America, Local 506 (Applicant) v. Diplock Durable Floor Company Limited (Respondent) v. Provincial Conference of Ontario of the Operative Plasterers and Cement Masons International Association of the United States and Canada on behalf of its affiliated Local Unions 70, 124, 151, 162, 344, 345, 598, 915 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional section in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (21 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant	5	
Number of ballots marked in favour of intervener	6	

2353-79-R: Ontario Nurses' Association (Applicant) v. The Penetanguishene General Hospital (Respondent).

Unit: "all lay registered and graduate nurses employed in a nursing capacity by Penetanguishene General Hospital at Penetanguishene, save and except Head Nurses, persons above the rank of Head Nurse and persons regularly employed for not more than 24 hours per week." (30 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		29
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	14	

2400-79-R: Labourers' International Union of North America, Local 1059 (Applicant) v. McKay-Cocker Construction Limited (Respondent) v. Operative Plasterers-Cement Masons International Association Local 151 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener	3	

Certifications Dismissed Subsequent to Post-Hearing Vote

0769-79-R: Printing Specialties & Paper Products Union Local 701, London Ontario (Applicant) v. Atlantic Packaging Products Limited (Respondent) v. Canadian Paperworkers Union (Intervener #1) v. Canadian Chemical Workers Union (Intervener #2).

Unit: "all employees of the respondent located at Ingersoll, Ontario, save and except foremen, persons above the rank of foreman, office staff and sales staff." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots		13
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	11	

1038-79-R: Canadian Union of Fast Food Service Workers (Applicant) v. The Great Canadian Pizza Company (Division of 401825 Ontario Limited) (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Mississauga save and except supervisors and persons above the rank of supervisor." (6 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	3	

2143-79-R: Service Employees' Union, Local 478, AFL, CIO, CLC (Applicant) v. Northern Lease Benefits Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Kirkland Lake, save and except practising members of the dental profession and administrator." (16 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots		15
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	8	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1845-79-R: Interior Systems Contractors Association of Ontario and Acoustical Association of Ontario (Applicants) v. The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America (Respondents).

0004-80-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Seaforth Building Group (Respondent).

0016-80-R: Canadian Paperworkers Union CLC (Applicant) v. Munn Envelope Co. (Respondent).

0025-80-R: Canadian Union of Public Employees (Applicant) v. Jewish Vocational Services of Metropolitan Toronto (Respondent).

0033-80-R: United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. E.S. Fox Limited (Respondent).

0085-80-R: Labourers' International Union of North America, Local 506 (Applicant) v. P. & R. Concrete Finishing (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener).

0101-80-R: Labourers' International Union of North America, Local 506 (Applicant) v. Structural Floors Finishing Limited (Respondent).

0102-80-R: Labourers' International Union of North America, Local 506 (Applicant) v. Aero Block & Precast Limited (Respondent).

APPLICATIONS UNDER SECTION 1(4)

1222-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Donald A. Foley Limited, Kingston Sand & Gravel Limited and/or Kingston Aggregates and/or Maceron Limited and/or 429185 Ontario Limited (Respondents). (*Granted with the Exception of Kingston Sand & Gravel which is Dismissed*).

1223-79-R: Labourers' International Union of North America, Local 247 (Applicant) v. Donald A. Foley Limited and Kingston Sand & Gravel Limited and/or Kingston Aggregates and/or Maceron Limited and/or 429185 Ontario Limited (Respondents). (*Granted with the Exception of Kingston Sand & Gravel which is Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2223-79-R: William H. Murray (Applicant) v. Local 756 of the Hotel and Restaurant Employee's International Union (Respondent) v. The Firestone War Veterans' Association (Intervener). (5 employees). (*Dismissed*).

2282-79-R: Employees of the County of Lennox & Addington Road Department (Applicant) v. Service Employees International Union, Local 183 (Respondent) v. The Corporation of the County of Lennox & Addington (Intervener). (18 employees). (*Dismissed*).

2329-79-R: Western Propeller (Atlantic) Limited (Applicant) v. International Association of Machinists and Aerospace Workers District Lodge 717 (Respondent). (10 employees). (*Granted*).

2334-79-R: June Gibbs, Clare Marie Moffatt (Applicants) v. Retail, Wholesale & Department Store Union (Respondent) v. Stoney Creek Dairies Limited (Intervener). (2 employees). (*Granted*).

2395-79-R: Sharon Steel (Applicant) v. Hotel and Restaurant Employee's Union, Local 756 (Respondent) v. Welland Hotel (Thorold) Limited (Intervener). (4 employees). (*Dismissed*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

2086-79-R: United Food and Commercial Workers International Union, Canadian Labour Congress, AFL, CIO (Applicant) v. The Northumberland and Newcastle Board of Education (Respondent) v. Group of Employees (Objectors). (*Granted*).

APPLICATIONS FOR CONSENT TO PROSECUTE

2190-79-U: Kelsey-Hayes Canada Limited, Eureka Foundry Plant, Woodstock Division (Applicant) v. Fred Cattell, Frederick Gray, Alexander Hunter, and other Respondents listed on Schedule "A" (Respondents). (*Withdrawn*).

2341-79-U: Riverside Hospital of Ottawa (Applicant) v. Canadian Union of Operating Engineers and General Workers (Respondent). (*Dismissed*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0758-79-U: Phyllis Barr (Complainant) v. Somerville Industries Limited (Respondent) v. International Chemical Workers Union (Intervener). (*Dismissed*).

0562-79-U: Ontario Taxi Association, Local 1688, CLC, (Complainant) v. Glen Taxi 1978 Limited (Respondent). (*Granted*).

0945-79-U: United Electrical, Radio & Machine Workers of America and its Local 504 (Complainant) v. Westinghouse Canada Limited (Respondent). (*Granted*).

1095-79-U: Zoltan Zahoransky (Complainant) v. Michael Hren, Gamal R. Badawoy and Local 576, Ontario Public Service Employees Union (Respondents) v. Toronto East General and Orthopaedic Hospital Inc. (Intervener). (*Granted*).

1096-79-U: Zoltan Zahoransky (Complainant) v. Local 576 The Ontario Public Service Employees Union (Respondents) v. Toronto East General and Orthopaedic Hospital Inc. (Intervener). (*Granted*).

1360-79-U: Toronto Typographical Union No. 91 (ITU) (Complainant) v. Goldcraft Printers Limited (Respondent). (*Dismissed*).

1491-79-U: Canadian Union of Public Employees (Complainant) v. ABC Day Nursery and Kindergarten Limited (Respondent). (*Granted*).

1525-79-U: Shirley Sadina De Prez (Complainant) v. Amalgamated Clothing & Textile Workers Union and William Cline Company Limited (Respondents). (*Dismissed*).

1549-79-U: Canadian Union of Public Employees (Complainant) v. ABC Day Nursery and Kindergarten Limited (Respondent). (*Granted*).

1574-79-U: Canadian Union of Public Employees (Complainant) v. ABC Day Nursery and Kindergarten Limited (Respondent). (*Granted*).

1577-79-U: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Complainant) v. Relac Construction Limited (Respondents). (*Withdrawn*).

1581-79-U: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Complainant) v. Relac Construction Limited (Respondent). (*Withdrawn*).

1606-79-U: Canadian Union of Public Employees (Complainant) v. ABC Day Nursery and Kindergarten Limited (Respondent). (*Granted*).

1609-79-U: Kenneth W. Brown (Applicant) v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 199 (Respondent #1) v. General Motors of Canada Limited (Respondent #2). (*Dismissed*).

1649-79-U: The Canadian Union of Public Employees and its Local 2286 (Complainant) v. The Roman Catholic Children's Aid Society for the County of Essex (Respondent). (*Withdrawn*).

1781-79-U: Emanuel Sky (Complainant) v. Metropolitan Toronto Civic Employees' Union, Local 43, Canadian Union of Public Employees (Respondent). (*Withdrawn*).

1918-79-U: R.W. Kuszelewski (Complainant) v. Consolidated Fastfrate Limited (Respondent) v. Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener). (*Dismissed*).

1960-79-U: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Banvil Limited (Respondent). (*Withdrawn*).

1998-79-U: Service Employees Union, Local 204 (Complainant) v. Canada Catering Company Limited (Respondent). (*Dismissed*).

2010-79-U: Nik Habermel (Complainant) v. Ben Sharp (Respondent). (*Withdrawn*).

2011-79-U: Mr. Nik Habermel (Complainant) v. Berkely Mechanical Division of W.O.K. Mechanical Enterprises (Respondent). (*Withdrawn*).

2012-79-U: Mr. Nik Habermel (Complainant) v. Trans-Nation Inc. Construction (Respondent). (*Withdrawn*).

2013-79-U: Mr. Nik Habermel (Complainant) v. Trans-Nation Inc. Construction (Respondent). (*Withdrawn*).

2126-79-U: Ontario Taxi Association 1688 CLC (Complainant) v. Niagara Veteran Taxi Co. (Respondent) (*Withdrawn*).

2212-79-U: Hotel and Club Employees' Union, Local 299, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union AFL, CIO, CLC (Applicant) v. Monarch Steakhouse Restaurant and Tavern and Sam Vrantisidis (Respondents). (*Granted*).

2281-79-U: United Food and Commercial Workers International Union (Complainant) v. Tilden Rent-A-Car (Toronto International Airport) (Respondent). (*Withdrawn*).

2290-79-U: Ontario Nurses' Association (Complainant) v. Bestview Holdings Limited (Respondent). (*Withdrawn*).

2296-79-U: Amalgamated Clothing & Textile Workers Union AFL, CIO, CLC (Complainant) v. Jolly Jumper Inc., (Respondent). (*Withdrawn*).

2297-79-U: Canadian Paperworkers Union Local 343 (Complainant) v. Milno-Markham Manufacturing Company Limited (Respondent). (*Withdrawn*).

2303-79-U: Donald J. Earhart (Complainant) v. Mr. Ian Logan – Business Agent 494 Brotherhood Carpenters and Joiners of America (Respondent). (*Withdrawn*).

2305-79-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Complainant) v. Cummings Signs of Canada Limited (Respondent). (*Withdrawn*).

2357-79-U: Anthony R. Birrell (Complainant) v. Canadian Union of Public Employees, Local 1320 (Respondent) v. Scarborough Centenary Hospital Association (Intervener). (*Granted*).

2377-79-U: United Food and Commercial Workers International Union (Complainant) v. Tilden Rent-A-Car (Toronto International Airport) (Respondent). (*Withdrawn*).

2378-79-U: United Food and Commercial Workers International Union (Complainant) v. Tilden Rent-A-Car (Toronto International Airport) (Respondent). (*Withdrawn*).

2389-79-U: Great Lakes Forest Products Limited (Complainant) v. International Brotherhood of Electrical Workers, Local Union 1565 (Respondent). (*Withdrawn*).

2413-79-U: Thomas Forestell & Randall Hall (Complainant) v. United Steelworkers of America Local 8562 (Respondent). (*Withdrawn*).

2415-79-U: Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Complainant) v. Capital Commercial Laundry Limited and J. Kirschman (Respondents). (*Terminated*).

2416-79-U: John Prymoratz (Complainant) v. International Chemical Workers Union, Drug Trading Company (Respondents). (*Withdrawn*).

2423-79-U: Ontario Nurses' Association (Complainant) v. Hillcrest Hospital (Respondent). (*Withdrawn*).

2438-79-U: James Jackson (Complainant) v. Local 280 of the International Bev. Dispensors and Bartenders Union (Respondent). (*Withdrawn*).

2459-79-U: Pharmacists and Professional Employees Association, Local 1976 (Complainant) v. Erin Mills Lodge (Respondent). (*Withdrawn*).

2469-79-U: Mr. Marino Peressini (Complainant) v. Mr. Ivan Renzella, B.A. Local 28 (Bricklayers) (Respondent). (*Withdrawn*).

2471-79-U: Len Townson (Complainant) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Respondents). (*Withdrawn*).

0002-80-U: Michael Brinovec (Complainant) v. Sheet Metal Workers' International Association, Local 575 and Carrier Air Conditioning (Canada) Limited (Respondents). (*Withdrawn*).

0044-80-U: Pharmacists and Professional Employees Association, Local 1976 (Complainant) v. Erin Mills Lodge and Donna Dawson and Edwin Reilly (Respondent). (*Withdrawn*).

0057-80-U: Oil, Chemical and Atomic Workers International Union (Complainant) v. Ethyl Canada Inc. (Respondent). (*Withdrawn*).

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2340-79-M: Hunter Enterprises Orillia Limited (Employer) v. Sheet Metal Workers International Association, Local 542 (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 55

1153-79-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261 (Applicant) v. 423131 Ontario Inc. and 423132 Ontario Inc. carrying on business under the Registered Firm Name and Style of Calmil Enterprises (Respondents). (*Dismissed*).

1953-79-R: Canadian Union of Public Employees (Applicant) v. Middlesex-London District Health Unit (Respondent) v. Association of Allied Health Professionals, Ontario, for and on behalf of its Chartered Local Association #4 (Intervener). (*Granted*).

1972-79-R: Union of Canadian Retail Employees, Local 1000A Chartered by the United Food and Commercial Workers International Union (Applicant) v. More Groceteria Limited, Douglas R. More, and Loblaws Limited (Respondents). (*Granted*).

2304-79-R: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. W.N. Construction (Ottawa) Ltd., W.N. Holdings Limited, and W.N. Developments (Ottawa) Limited (Respondents). (*Granted*).

APPLICATIONS UNDER SECTION 76 (FINANCIAL STATEMENT REQUESTED BY TRADE UNION MEMBER)

0542-79-M: Barry Allen and Wayne Clearwater (Complainants) v. Amalgamated Transit Union, Local 113 (Respondent). (*Dismissed*).

1185-79-M: Ray W. Kuszelewski (Complainant) v. Howard Shelkie (Respondent). (*Withdrawn*).

APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 78

2218-79-U: Michael N. Grunwell (Complainant) v. Fanshawe College of Applied Arts and Technology (Respondent). (*Dismissed*).

JURISDICTIONAL DISPUTE

1309-79-JD: Toronto Star Newspapers Limited (Complainant) v. Graphic Arts International Union, No. 35, G.A.I.U. and Printing and Graphic Communications Union No. N-1 (Respondents). (*Granted*).

APPLICATIONS FOR THE COLLEGES COLLECTIVE BARGAINING ACT, 1975 UNDER SECTION 82

1834-78-U: The Budd Automotive Company of Canada (Applicant) v. Employees of the Applicant, set out in Schedules A, B, C, D, and E, (Respondents). (*Withdrawn*).

1164-79-U: Budd Canada Inc. (Applicant) v. Employees of the Applicant set out in Schedules A, B, and C, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0978-79-M: Canadian Union of Public Employees, Local 207 (Applicant) v. The Regional Municipality of Sudbury (Respondent). (*Withdraw*).

1263-79-M: Ontario Nurses' Association (Applicant) v. Royal Ottawa Hospital (Respondent). (*Dismissed*).

1490-79-M: Canadian Union of Public Employees and its Local 714 (Applicant) v. Corporation of the Town of Fort Erie (Respondent). (*Withdrawn*).

1820-79-M: Leeds, Grenville and Lanark District Health Unit (Applicant) v. Canadian Union of Public Employees Local 1559 (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 112(a)

0941-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Badner Engineering Construction Ltd. (Respondent). (*Terminated*).

0956-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Donald A. Foley Limited (Respondent). (*Granted*).

1423-79-M: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Vic Starchuk & Associates Inc. (Respondent) v. Employer Bargaining Agency (Intervener). (*Granted*).

1747-79-M: The Ontario Provincial Conference of Bricklayers and Allied Craftsmen Local No. 12, Kitchener, Ontario (Applicant) v. G. & A. Masonry Limited (Respondent). (*Withdrawn*).

2096-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ranfas Investments Limited (Respondent). (*Withdrawn*).

2316-79-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Form Work Association & Lantar Construction Limited (Respondent). (*Granted*).

2383-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Amherst Plumbing Limited (Respondent). (*Withdrawn*).

2385-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Will-Fran Heating Limited (Respondent). (*Withdrawn*).

2399-79-M: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Piper Construction, Division of Greenore Developments Limited and Bea-Pip Construction Limited (Respondents). (*Granted*).

2406-79-M: Local 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Mechanical Contractors Association of Sudbury and Manitou Mechanical Limited (Respondents). (*Withdrawn*).

2408-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Ward Crane Rentals Limited (Respondent). (*Granted*).

2431-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 599 (Applicant) v. Erik Fabricius Plumbing & Heating Limited (Respondent). (*Granted*).

2445-79-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. John Graham Construction Limited and The Carpenters Employer Bargaining Agency (Respondents). (*Granted*).

2466-79-M: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Greenfield Electric Incorporated, owned and operated by 396009 Ontario Limited (Respondent). (*Withdrawn*).

0039-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Form Work Association and Rise Forming Limited (Respondent). (*Withdrawn*).

0141-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. Underground Services Limited (Respondent). (*Withdrawn*).

REFERENCE TO BOARD PURSUANT TO SECTION 127

1882-79-M: "And in the Matter of Certain Designations of Certain Employee and Employer Bargaining Agencies." (*Granted*).

APPLICATION FOR RECONSIDERATION OF BOARD'S DECISION

0680-79-R: Association of Allied Health Professional: Ontario (Applicant) v. Victorian Order of Nurses, London-St. Thomas Branch (Respondent) v. Canadian Union of Public Employees (Intervener). (*Dismissed*).

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0819-79-U Kuldip Singh Samra, Complainant, v. United Glass and Ceramic Workers of North America, Local 200, Respondent, v. Consumers Glass Company Limited, Intervener.

Adjournment – Complainant receiving notice of hearing – Failing to appear and not instructing counsel – No grounds for adjournment

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: Michael F. Smith for the complainant; Chris G. Paliare for the respondent; James Hassell and Huntley Duff for the intervener.

DECISION OF THE BOARD; June 17, 1980

1. In a decision in this matter dated September 24, 1979, [1979] OLRB Rep. Sept. 861 the Board stated in the last two paragraphs of that decision:

“The Board finds that the respondent’s conduct with respect to Mr. Samra’s grievance was arbitrary within the meaning of section 60 of The Labour Relations Act. Section 79(4) of the Act sets forth the remedies which the Board may provide for such a violation of section 60. Pursuant to section 79(4) the Board directs the respondent and the intervener to process Mr. Samra’s grievance to arbitration.

In the event that a board of arbitration determines that compensation is to be paid to Mr. Samra, some of the compensation may be referable to delay which has been occasioned by the respondent’s violation of section 60 of the Act. The Board remains seized of this complaint and will entertain representations with respect to the amount of compensation, if any, is to be borne by the respondent.”

2. In a decision dated January 16, 1980, a board of arbitration in a decision by the majority set aside the discharge of the complainant and substituted a suspension from February 19, 1979, to the date of the award without compensation. The decision of the majority concluded by stating:

“We direct that the grievor be forthwith reinstated to his prior classification on condition that for a period of two years from the date of this Award he not commit any acts of a similar nature as those which led to his discharge. Should he engage in any fight, assault, threat or use abusive language towards his superiors, such will be deemed to be a breach of the condition with the result that his employment will thereupon forthwith terminate.

We shall retain jurisdiction over this matter in the event that the parties experience any difficulty in the implementation of this Award including the determination of any question that may arise as to whether any breach of the imposed condition has occurred.”

3. In a letter to the Board dated March 20, 1980, counsel for the complainant stated:

"The decision of the board in this matter dated September 24, 1979, provided in its last paragraph that in the event that the Board of Arbitration determines the compensation is to be paid to Mr. Samra some of the compensation may be referable to delay which has been occasion by the respondent's violation of section 60 of the Act. The board therefore remained seized of this complaint and would entertain representations with respect to the amount of compensation, if any, is to be born [sic] by the respondent.

The Board of Arbitration in reinstating Mr. Samra in his employment did not make an award of compensation. However, Mr. Samra is not satisfied that sufficient effort was made to put before the Board of Arbitration the circumstances, justifying [sic] an award of compensation. Unfortunately, the union which may be liable to pay compensation to Mr. Samra, retained and instructed the same firm of solicitors that apposed [sic] Mr. Samra before the Labour Relations Board to represent Mr. Samra before the Arbitration Board. The result is an apparent conflict of interest.

On behalf of Mr. Samra I am seeking an opportunity to bring these circumstances before the Ontario Labour Relations Board for consideration pursuant to the decision of the Board. Can you make arrangements for such a hearing."

4. In response to the letter referred to in the preceding paragraph, the Board received letters from counsel for the respondent and the intervener. On May 13, 1980, the Board sent a Form 7, Notice of Hearing, to the parties. The notice advised the parties that a hearing for the purpose of considering the representations of the parties on the matters raised in their correspondence to the Board would take place at 9:30 a.m. on June 17, 1980.

5. At the commencement of the hearing in this matter on June 17, 1980, counsel for the complainant requested an adjournment of the hearing on the grounds that the complainant was in Britain. Counsel informed the Board that he had last spoken to his client on Saturday, June 7, 1980. Counsel stated that his client was under some strain and had recently come to an agreement with the intervener to terminate his employment and has received a settlement because he could no longer perform his job due to injuries. Counsel for the complainant informed the Board that the complainant's wife had informed him that the complainant had left Toronto on June 10, 1980, after leaving a message and some money for his wife. Counsel for the complainant also informed the Board that the complainant was under pressure from his wife as a result of losing his job.

6. Counsel for the complainant stated that he desired to call the complainant as a witness before the Board and was not in a position to proceed with the complaint in the absence of the complainant. Counsel for the complainant informed the Board that he had received notice of this hearing on May 16, 1980, and that the complainant had received notice of this hearing shortly after May 16, 1980. Counsel for the complainant stated that he had tried to arrange an adjournment with counsel for the respondent and the intervener at 3:45 p.m. on June 16, 1980.

7. While counsel for the intervener was initially inclined to grant the request for an adjournment when approached on June 16, 1980, at the hearing he strongly opposed the request for an adjournment. After being contacted by counsel for the complainant, counsel for the intervener contacted the intervener and discovered that as recently as Thursday, June 12, 1980, the complainant had attended at the intervener's offices and had received his severance pay as required by the collective agreement. Counsel for the intervener stated that as a result of what he now knew he would not agree to an adjournment.

8. Counsel for the respondent also strongly opposed the request for an adjournment and stated that as he understood the situation, counsel for the complainant has had no direct contact with his client. Counsel for the respondent stated that he was prepared to proceed and had present four lawyers who were to be called to give evidence at some inconvenience to their own practices. Counsel for the respondent confirmed that his information also placed the complainant in Toronto at least as recently as Thursday, June 12, 1980.

9. In response to questions by the Board, counsel for the complainant stated he could not dispute the position of counsel for the respondent and the intervener that the complainant had been in Toronto at least as recently as Thursday, June 12, 1980. Counsel for the complainant also agreed that he had no personal knowledge that the complainant was out of the jurisdiction and could not say from his information when the complainant was expected to return to Toronto.

10. The Board dismissed the request for an adjournment at the conclusion of the argument. It is quite clear that counsel for the complainant, through no fault of his own, is not in a position to inform the Board of the whereabouts of his client. At the very best, counsel for the complainant is in the possession of second-hand information, some of which is untrue. Counsel for the complainant made reference to personal pressure on the complainant from his wife which followed his leaving the intervener's employment. However, there is nothing before the Board to substantiate such views by counsel for the complainant. It should be remembered that counsel for the complainant has had no recent and direct contact with his client. The Board is not prepared to accept the validity of the grounds upon which an adjournment has been requested. In addition, having regard to the fact that the adjournment was requested on such very short notice and that the respondent and the intervener were prepared to proceed and opposed the request for an adjournment, such request is denied.

11. There was neither evidence nor representations before the Board with respect to the purpose of hearing set out in the Notice of Hearing. In these circumstances, the request of the complainant for relief is dismissed.

2465-79-R Robert Woelk and Randal Koop, Applicant, v. International Union of Operating Engineers, Local 793, Respondent, v. **Erie Sand & Gravel Limited** and Sterling Acre Farms Limited, Interveners.

Related Employer – Termination – Timeliness – Whether declaration under section 1(4) affecting timeliness of application under section 49 – Section 1(4) and Section 55(10) compared

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *Charles F. Clark, Robert Woelk and Randal Koop for the applicants; S. B. D. Wahl, J. Redshaw and W. Conlin for the respondent; Hugh B. Geddes, Q.C., and Ben Koop for the interveners.*

DECISION OF THE BOARD; June 6, 1980

1. This is an application under section 49 of *The Labour Relations Act* for termination of the respondent union's bargaining rights. This termination application was heard together with a request for reconsideration of an earlier decision of the Board in which, on the consent of the parties and pursuant to section 1(4) of the Act, the Board declared that Erie Sand & Gravel Limited ("Erie"), and Sterling Acre Farms Limited ("Sterling"), constituted one employer for the purposes of the Act. In order to understand the context in which the termination application arose, it is necessary to briefly review the events leading to the earlier decision of the Board under section 1(4).

2. On February 28, 1980, the union made an application under sections 55 and 1(4) of *The Labour Relations Act*, for a declaration that there had been a sale of business from Erie to Sterling; or, alternatively, that the two companies constituted one employer for the purposes of the Act. Prior to the hearing the parties filed with the Board Minutes of Settlement and a Consent Order requesting the Board to issue certain declarations and orders in accordance with the terms which they had agreed upon. The relevant portions of the agreement (which were incorporated into a Board order) are as follows:

"The parties agree in settlement of the Application under Section 55 and/or 1(4) of *The Labour Relations Act*, R.S.O. 1970, c. 232, as amended, captioned as O.R.L.B. [sic] File No: 2225-79-R and the grievance dated November 13th, 1979, to request that the Ontario Labour Relations Board endorse its record with the following declarations and orders:

1. A Declaration that Erie Sand and Gravel Limited and Sterling Acre Farms Limited constitute one employer for the purposes of the Act and, at all material times, they were carrying on associated or related activities or businesses under common control or direction within the meaning of Section 1(4) of the Act;

2. A Declaration that Erie Sand and Gravel Limited and Sterling Acre

Farms Limited are bound to the collective agreement between Erie Sand & Gravel Co. Ltd. and the International Union of Operating Engineers, Local 793 expressed to be effective from June 1st, 1977 until April 30th, 1980 ("the Collective Agreement");

3. An Order that Erie Sand and Gravel Limited and Sterling Acre Farms Limited apply to full terms and conditions of the Collective Agreement with respect to all employees employed at the gravel pits operated by Erie Sand and Gravel Limited and Sterling Acre Farms Limited in the Counties of Essex and Kent, including but not limited to gravel pits located at R.R. #2, Leamington, Ontario; 5th Concession, Mersea Township; [sic] and Oak Street, Leamington, Ontario, except foremen, and persons above the rank of foreman, office staff, weigh scale personnel, and except drivers who operate licenced vehicles off the gravel pit property.

Without limiting the generality of the foregoing, and solely for the purposes of clarity, William Dick, Robert Woelk, John Koop and Allan Koop are employees working within the bargaining unit above described and Erie Sand and Gravel Limited and Sterling Acre Farms Limited shall apply the full terms and conditions to the Collective Agreement with respect to their employment as of the date hereof."

3. There is no doubt that Sterling and Erie are engaged in related activities under common control and direction. The two companies are both controlled by Ben Koop, and are jointly engaged in the extraction, processing and sale of gravel. Erie has one employee and Sterling has five. Two of these employees are the sons of the owner. As a consequence of the section 1(4) declaration, John Koop, Allan Koop, William Dick and Robert Woelk, who had been employed by Sterling, were "swept into" the respondent's bargaining unit. These employees, of course, then made up a substantial majority of the members of the unit, and none of them were union members. It is these employees who now seek to terminate the union's bargaining rights. Before turning to the circumstances surrounding the termination application itself, and the voluntariness of the employees' expressed opposition to the union, it will be convenient to deal briefly with certain other allegedly fundamental defects upon which the respondent relies.

4. The respondent contends that the collective agreement allegedly binding the parties was not sufficiently proved; and that accordingly, the application must be dismissed on that ground. The agreement in question, it will be observed, is the very one which the Board had, on the request of the respondent, earlier declared to be binding upon Sterling, pursuant to section 1(4) of the Act. In any event, John Koop identified his father's signature on the document. We are satisfied on the evidence before us that the agreement has been sufficiently proved.

5. We are also satisfied on the evidence before us that the applicants are employees in the bargaining unit with status to bring the present application. Robert Woelk's *viva voce* evidence indicates that he spends at least fifty per cent of his time, on a daily basis, operating a front-end loader. He was specifically named in the Minutes of Settlement and Consent Order, to which we have already referred. If the Board were in any doubt as to the intention of the parties, that doubt is totally dispelled by their own agreement that Mr. Woelk is an employee

working within the bargaining unit; and we do not see how the respondent can now maintain any other position. Indeed, apart altogether from the effect of the Board's earlier order, it is arguable that the agreement of the parties, which forms the basis of that decision, operates as an amendment or clarification to the scope of the bargaining unit.

6. Section 1(4) vests in the Board a discretion to "grant such relief by way of declaration or otherwise as it may deem appropriate". Counsel urged that the Board should exercise this discretion to raise a bar to the present termination application, analogous to that contained in section 55(10) of *The Labour Relations Act*. Section 55(10) can give a declaration of a sale of a business made under section 55(3) or section 55(6), the same effect as a certification — thus barring certain applications, including, *inter alia*, certification or termination. Counsel contended that relief under section 1(4) would be entirely illusory if an employer could set up a related company, and hire a group of non-union employees outside the terms of the established collective agreement; then rely on those employees to undermine any 1(4) declaration by launching a termination application.

7. The Board has carefully considered the respondent's argument and we are not unaware of the problem faced by a union which seeks a section 1(4) declaration in respect of a related employer with an established labour force, immediately prior to the "open period" of the parties' collective agreement. Unless there is evidence of an illegal scheme to undermine the union's bargaining rights (which would be a breach of section 56 and would raise considerable doubts concerning the voluntariness of any subsequent termination application) the union may have acquired the right to bargain on behalf of a number of employees who are unsympathetic to it. Nevertheless, we do not think that the discretion vested in the Board under section 1(4), extends to the creation of a bar similar to that in section 55(10). To adopt counsel's view would imply that by the exercise of a statutory discretion, the Board could significantly modify the timeliness requirements in, *inter alia*, section 49. The fact that this power was expressly granted in section 55(10), suggests to us that it is not a matter which the Legislature intended to be dealt with through the exercise of a general discretion. We do not think we have the authority to impose the bar which counsel requests.

8. There remains the question of the voluntariness of the employees' expression of opposition to the trade union. Section 49(3) of *The Labour Relations Act* provides:

"Upon an application under subsection 1 or 2, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause *j* of subsection 2 of section 92 that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated."

The Board must be satisfied on the basis of the evidence before it, that when the employees signed the petition or other written statement in opposition to the union, they were motivated by a genuine desire to terminate the union's bargaining rights; and were not concerned that a failure to signify their opposition would be communicated to their employer or would result in

adverse consequences. Robert Woelk and John (Randal) Koop, gave evidence concerning the origination of the employees' statement in opposition to the union.

9. The hearing date for the union's section 55/1(4) application was fixed for April 2, 1980 and Notice of the Application was posted on the employer's premises on or about March 14, 1980. The employees saw and discussed the application on Monday, March 17th, and on the Wednesday thereafter. The employees decided that they would need the assistance of a solicitor. Alan Koop and William Dick chose the name of a solicitor who had advertised himself in the yellow pages of the telephone book as practising in the field of labour relations. His name was the fourth on the list of solicitors advertising this area of expertise. The employees visited the solicitor on Thursday, March 20th, and, because they were dissatisfied with his response, subsequently contacted Charles F. Clark. Mr. Clark is the fifth solicitor on the list. It was he who drafted the employees' request for reconsideration of the Board's section 1(4) determination, and assisted them to frame their subsequent termination application. When the matter came on before us, the request for reconsideration was abandoned, because it was evident that the grounds advanced by the employees would not have prompted the Board to alter its earlier decision.

10. Both employees were subjected to a searching cross-examination, which revealed some minor inconsistencies in their evidence and certain instances when they could not recall all of the details of the events leading to the present application. However, one cannot expect an untrained witness to recall with precision, past events which might not have seemed significant at the time. We are satisfied with the main thrust of their evidence; namely that; a group of employees, who did not wish to be represented by a union, suddenly found themselves so represented, discussed the matter, consulted a solicitor, and launched a timely application to terminate the union's bargaining rights. This is not a situation in which employees have had a "sudden change of heart", or are seeking, without apparent reason, to displace a long-established bargaining agent. We accept counsel's contention that the Board must exercise considerable caution when dealing with small family businesses in which relatives of the owner are members of the bargaining unit. Nevertheless, the Board has had the opportunity to assess the evidence of the various witnesses and, in the circumstances of this case, we are satisfied that at least forty-five per cent of the employees of Erie and Sterling in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of April 18, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the Act.

11. The Board directs that a representation vote be taken of the employees of Erie and Sterling. Those eligible to vote are all employees employed at the gravel pits of Erie and Sterling in the County of Essex and Kent, save and except foremen, persons above the rank of foreman, office staff, weigh scale personnel, and drivers who operate licensed vehicles off the gravel pit property on the date hereof who do not voluntarily terminated their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

12. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Erie and Sterling.

13. The matter is referred to the Registrar.
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0150-79-R; 0153-79-R; 0073-80-R; 0074-80-R Hotels, Clubs, Restaurants, Tavern, Employees' Union, Local 261, Applicant, v. **Fuller's Restaurant**, Respondent, v. Group of Employees, Objectors.

Certification – Practice and Procedure – Original certificate quashed by court – Whether matter remitted back to Board by operation of law – Whether new application for certification necessary

BEFORE: George W. Adams, Chairman, and Board Members J. D. Bell and W. F. Rutherford.

***APPEARANCES:** Alick Ryder, Q.C. and Eleanor Dunn for the applicant; C. E. Humphrey and D. Leafloor for the respondent; and Michael Gordon, Carmen Fisher, Marion Eveline and Bonnie Bellefeuille for the objectors.*

DECISION OF THE BOARD; June 2, 1980

1. These matters are herein consolidated.
2. They arise out of four applications for certification and an earlier decision of the Supreme Court of Ontario with respect to the two earliest applications. The two earlier applications were filed on April 23, 1979 and pertain to employees of the respondent employed in a proposed bargaining unit of full-time employees and a proposed bargaining unit of part-time employees respectively. The two applications were consolidated and heard by a panel of this Board on May 14, 1979. The panel issued its decision dated May 28, 1979, [1979] OLRB Rep. May 395, which decision was quashed by the Supreme Court of Ontario by a judgment dated March 11, 1980, reported at 80 CLLC ¶14,021 and written for the Court by Mr. Justice Reid.
3. In its decision of May 14, 1979 [1979] OLRB Rep. May 395 the Board refused to consider a timely and relevant statement of objection filed in opposition to the trade union's two applications by a number of employees employed in the two proposed bargaining units because the petition was not, on its face, a clear statement in opposition to the union. In failing to consider the petition, the Board at the same time refused to hear from a number of individual petitioners and their solicitor who had presented themselves at the hearing of the applications for certification.
4. The petitioners applied to the Supreme Court of Ontario for judicial review of the Board's decision and were successful in having the Board's decision quashed. The Court disagreed both with the Board's characterization of the petition filed by the objecting employees and with the Board's interpretation of Rule 48, the rule which deals with the form and timing of trade union membership and of objection by employees to certification of a trade union.
5. The principal reasoning of Mr. Justice Reid in overturning the Board's decision is found at page 12,121 of the Court's reasoning and reads:

“There is no question that if the Board had given Mr. Gordon a moment or so to do so he could have called evidence to substantiate the desire of the petitioners to object, for the necessary witnesses were there. The Board prevented itself from doing so, however, by its super-critical reading of the documents filed and its very narrow interpretation of section 48(2) of its Rules, an interpretation that would certainly not have sprung to the minds of persons reading the words of the subsection in their ordinary sense.

The Board’s error lay in failing to give the objectors a fair hearing as required by section 91(12). In doing so it violated the rules of natural justice which that section positively invoked. A denial of natural justice is a jurisdictional error. That is well-established. It is equally well established that the privative clause will not prevail against it.”

6. The relief granted to the applicants is found at page 12,121 of the judgment which provides:

“The result is that the Board’s decision or award, dated 28 May, 1979, is quashed. The error is wholly attributable to the Board. The Board strongly attempted to support its order in this Court. It is proper that the Board should pay applicants’ costs. It is so ordered.”

7. The order taken out reflects the judgment in this regard. It provides:

“1. IT IS ORDERED that the above-mentioned Award dated the 28th day of May, 1979 of The Ontario Labour Relations Board be and the same is hereby quashed.

2. AND IT IS FURTHER ORDERED that the Respondent, The Ontario Labour Relations Board, do pay to the Applicants their costs of this motion forthwith after taxation thereof.”

8. By application dated April 11, 1980 the applicant trade union once again sought certification for the same two bargaining units of the respondent. These applications were given Board File Nos. 0073-80-R and 0074-80-R. However, the applicant’s solicitor wrote to the Board by letter dated April 18, 1980 requesting that the two earlier applications quashed by the Supreme Court be brought on again for hearing by the Board and advising that the two “fresh applications (were) advanced in the alternative to the original applications . . .” Counsel for the applicant also noted that the two “fresh applications” relied on the membership evidence filed in the two original applications. The full text of the letter is quite short. It reads:

“We are solicitors for the Applicant in the above-captioned matter. You will know that the Board’s Decision has been set aside by the Divisional Court and the matter remitted to the Board for conclusion. In the circumstances, we are by this letter asking the Board to bring these matters on again for hearing.

You will also know that our client has filed fresh Applications for Cer-

tification, relying on the original membership evidence. These applications have been given Board File Nos. 0073-80-R and 0074-80-R. We are advising the Board and the other parties concerned that the fresh applications are advanced in the alternative to the original applications which, as I say, we are asking to be brought on for hearing.

We understand that the Board has fixed May 2nd, 1980 to hear the fresh applications and we would ask that the original applications be heard at the same time."

9. The solicitors for the respondent by letter dated April 23, 1980 took the position that the earlier applications were "conclusively dealt with by the Divisional Court" and submitted it would be "most improper" for the Board to deal with them again. The full text of this letter reads:

"We are Solicitors for the respondent in the above-captioned matter. We are in receipt of a letter dated April 18, 1980 from Mr. J. A. Ryder, Q.C., Solicitor for the applicant.

Mr. Ryder in his letter states with regard to a previous application for certification relating to these two parties (Board Files No. 0150-79-R and 0153-79-R) that, '...the Board's Decision has been set aside by the Divisional Court and the matter remitted to the Board for conclusion'. It is submitted that this statement is incorrect and is not supported in any way by the Judgment of the Divisional Court released on March 11, 1980 nor by the Order subsequently taken out by the Solicitor for the applicants. The Judgment of the Court and the subsequent Order clearly indicate that the Decision of the Board was quashed. There is no indication in the Divisional Court's Judgment or the Order that anything was 'remitted to the Board for conclusion'. It is the position of the respondent that it would be most improper for the Board to consider the matters relating to the earlier application for certification, given that these matters have been finally and conclusively dealt with by the Divisional Court.

Mr. Ryder in his letter suggests that the most recent applications for certification (Board Files No. 0073-80-R and 0074-80-R) were filed 'in the alternative to the original application'. We would point out to the Board that there is no suggestion in the material filed in those applications that they are in the alternative to any previous application. Notice of the applicant's position that the new applications are in the alternative did not reach the respondent until after the terminal date set for the new applications.

For the above-noted reasons it is the respondent's position that the only matters pending before the Board are the applications for certification represented by Board Files No. 0073-80-R and 0074-80-R. The respondent objects to any matters other than those represented by the two most recent applications for certification being considered at the hearing set for May 2, 1980.

10. Counsel for the group of objecting employees by letter dated April 28, 1980, took the following position:

"I have reference to a letter forwarded to you by Mr. Ryder on behalf of the Applicant Union under the date of April 18th, 1980 and submitted in respect of Board File #'s 0150-79-R and 0153-79-R. I note and rely upon the representation made by Mr. Ryder in the second paragraph of that letter (a copy of which is enclosed) that the Union is '...relying on the original membership evidence' in those applications.

I take the position that the original membership evidence is 'stale dated' and the best evidence which the Board has in respect of the true wishes of the employees in this matter is contained in the statement of desire which was filed by me on behalf of the employees on April 21st, 1980.

I take the further position that if no new membership has been filed in this proceeding that the matter ought to be dismissed without a vote and that no vote ought to be ordered based on the original and stale dated membership evidence. Further if there be no new evidence and in the circumstances I take the position that the application itself ought not only to be dismissed but that a six month bar in respect of any further applications ought to be imposed."

11. The applicant's reply to the respondent's letter is contained in a letter dated April 28, 1980 and, in it, the applicant joins issue on the significance to be attributed to the Supreme Court's judgment quashing the Board's earlier decisions.

"I am writing in response to Mr. Humphrey's letter of April 23rd, 1980 which has taken issue with the use of my phrase 'remitted to the Board for conclusion'.

I am of course familiar with both the reasons for the Divisional Court Decision and its Order and don't suggest for a minute that these documents use the phrase in question. I do suggest however that the effect, in law, of the Court's Decision, is to leave outstanding a determination by the Board of the original Applications for Certification filed with it in Board File Nos. 0150-79-R and 0153-79-R.

It is our respectful submission that Mr. Humphrey errs when he says that the Court 'finally and conclusively' dealt with these matters. The Court has no jurisdiction to deal with Applications for Certification in the sense of either granting or refusing to grant a certificate. Nor is there any language in its Decision or Order which purports to assume such a power. It is submitted that the effect of the Court's Decision therefore is simply that the original Decision and hearing of the Board have been aborted and the rights of the parties in the original Applications remain to be determined. Accordingly, I have been instructed by our client to have the original Applications re-scheduled for such a hearing.

With respect to Mr. Humphrey's complaint that the new Applications are in the alternative to the original ones, I can only say that this is the position we take and that it is not for Mr. Humphrey to dictate to us our decision to proceed only with the new Applications in the alternative to a hearing on the original ones."

12. It was against these background events and submissions that the Board's Registrar scheduled the four applications for hearing before this panel of the Board on May 2, 1980.

13. The Board attempted to advise all parties to the hearing that it wished to entertain argument solely on the Board's jurisdiction to proceed with Board Files No. 0150-79-R and No. 0153-79-R. The panel was of the view that this jurisdictional matter should be decided before proceeding to hear any evidence relating to these two files and, clearly, before proceeding with Board Files No. 0074-80-R and No. 0073-80-R.

14. At the hearing the parties elaborated the positions outlined in their correspondence and reproduced above. Counsel for the applicant submitted that the Board was obligated to proceed with the two earlier cases and that the Supreme Court could not and did not purport to resolve the substantive issues outstanding between the parties. It was counsel's submission that the Supreme Court did not exercise an appellate function with respect to the Board. It simply nullified the Board's decision leaving it for the Board to complete the two outstanding matters before it. In support of this view, the Board was referred to *Re Labour Relations Board (Nova Scotia) and Little Narrows Gypsum Co. Ltd.* (1978), 82 D.L.R. (3d) 693, a decision of the Nova Scotia Supreme Court, Appeal Division which the applicant argued was on "all fours" with the instant case and directly contrary to the positions put forward on behalf of the respondent and objecting employees. Counsel for the objecting employees submitted that the Board had purported to exercise its powers by both the issuance of certificates and the refusal to reconsider its decision and that, therefore, it was now *functus officio*. Alternatively, counsel for the employees submitted that having refused to reconsider its decision and having "vigorously" defended its decision before the Court, the Board had created a reasonable apprehension of bias in the minds of the objecting employees and, therefore, the Board could proceed no further. It was further contended that if the applicant wishes the Board to proceed further and in the face of the judgment of the Supreme Court of Ontario, counsel for the applicant should apply to the Court for a clarification of its order. Counsel for the respondent argued that the applicant was, in effect, requesting the Board to "rehear" the original applications and that *The Labour Relations Act* does not provide the Board with the power to "rehear" matters. Support for this proposition was sought in *Regina v. Development Appeal Board, Ex parte Canadian Industries Ltd.* (1970), 9 D.L.R. (3d) 727. Counsel also referred the Board to *Regina v. Schiff et al, Ex parte Trustees of the Ottawa Civic Hospital*, [1970] 1 O.R. 752 in support of his submission that the failure of the Court to remit the matters back to the Board was fatal to the Board's jurisdiction to resume the two earlier proceedings that had been before it. In reply, counsel to the applicant emphasized that his client had a legal right to have its two earlier applications processed by the Board, a right that was itself enforceable in the courts by way of an application for judicial review seeking relief in the nature of mandamus.

15. We have reviewed the thoughtful submissions of all counsel and have concluded that the Board has the jurisdiction and is obligated to proceed with the two earlier applications for certification, Board Files No. 0150-79-R and No. 0153-79-R. After reviewing the judgment of Mr. Justice Reid in the light of the authorities, we have come to the conclusion that the

Court did not intend to dispose of these two proceedings before the Board conclusively (to use a term found in the respondent's submissions). Rather, it did not explicitly remit the matter to the Board because the application before the Court did not seek such an order and, because the Board was already obligated to proceed if this is what the applicant trade union subsequently wished the Board to do. We are in agreement with submissions of the applicant's counsel that *Re Labour Relations Board (Nova Scotia) and Little Narrows Gypsum Co. Ltd.*, *supra*, fundamentally supports the position he urged upon us. In that case a certificate issued November 26, 1976 had been quashed by the Trial Division of the Nova Scotia Supreme Court. There was no order remitting the matters therein back to the Board and when the Board announced its intention to continue to process the union's application, the respondent Company obtained an order prohibiting the Board from proceeding further. The granting of prohibition was based on the conclusion that the Board had exhausted its jurisdiction in certifying the applicant union (and in refusing to reconsider its decision) and the fact that the passage of time and inconvenience to the petitioning employees had been great. However, the Board successfully appealed the prohibiting order and the reasons of Chief Justice MacKeigan dealt exhaustively with the Nova Scotia Board's obligation to continue on with the proceedings before it. As for the passage of time and the lower court's concern for the inconvenience to the petitioners, the learned Chief Justice observed that prohibition cannot be used to stop the performance of an act within a tribunal's jurisdiction even though the Court may disapprove of the act being done or the way in which it will be done, provided that the tribunal has not shown its intention to exercise its jurisdiction unjudicially. In response to the argument that the Board had exhausted its power, Mr. Justice MacKeigan held that the quashing order had only quashed the certification order and did not wipe out the whole proceedings before the Board prior to the certification order. The proceedings therefore remained otherwise unchanged and the union's application remained an outstanding demand upon the Board. It was emphasized that a certiorari proceeding is not an appeal from an administrative tribunal and that a formal remission to the Board was not legally or practically necessary to enable the Board to continue to perform its duty in respect of the application.

16. Further support for this position is found in the recent decision of the Supreme Court of Ontario in *Nicholson and The Haldemand-Norfolk Regional Board of Commissioners of Police*, a judgment of the Divisional Court released May 7, 1980. In that case the applicant sought to prohibit a board of police commissioners from continuing with proceedings to terminate a probationary constable in the light of an earlier decision by the Supreme Court of Canada holding that the commissioners owed a duty to the constable to treat him "fairly", not arbitrarily." In rejecting the applicant's argument that the commissioners were, in effect, commencing a new proceeding which was now time barred, Mr. Justice Linden wrote:

"We are of the view that section 11 and the principle enunciated in *R. v. Adair*, *supra*, are not applicable in this case, because there has been no new proceeding instituted by the Board. Rather, we are of the opinion that the hearing scheduled by the Board for December 1, 1978 was to be a continuation of the original proceeding which was instituted on June 4, 1974, within the required six-month period.

The order of the Supreme Court of Canada, which restored the order of the Divisional Court, did not quash the entire proceeding of the Board; it merely quashed the *decision* that emerged from that proceeding. Consequently, although the Board's decision to terminate Nicholson has

been held to be a nullity because it was not arrived at in an acceptable manner procedurally, this does not mean that the proceeding was instituted improperly.

In an ordinary civil action, the limitation period stops running once the Writ is issued. In *Re Leslie* (1893), 23 O.R. 143, at p. 151, Chancellor Boyd stated:

'An action properly instituted bars the operation of the Statute of Limitations, and during its pendency times does not run.'

(See also *McLure v. Black* (1980), 20 O.R. 70 at p. 82; *Turley v. Williamson* (1865), 15 U.C.C.P. 538 (C.A.); *Young et al. v. Hobson et al.* (1879), 30 U.C.C.P. 431.) The Writ need not even be served to prevent the time from running."

When a decision reached after a civil trial is reversed and a new trial is ordered, there is no requirement to issue a new Writ of Summons. Analogizing to the ordinary civil action, therefore, the Board may continue with the proceeding from where it left off before it reached its decision, without any need to reinstitute it.

Consequently, we are of the view that the Board retains jurisdiction to continue the proceeding it commenced on June 4, 1974. The rights and duties of the parties will be decided in accordance with their status on that date, since for that purpose time has stood still for them. Nicholson, therefore, is to be treated, for purposes of the continuing hearing, as a probationary constable, which he was at the time the proceeding was commenced.

Clearly this must be so, for to hold to the contrary would render the decision of the Supreme Court of Canada academic. It is inconceivable that, after a ruling in his favour by the Supreme Court espousing certain principles relating to his fair treatment, Nicholson could then avoid the application of those principles to himself on the continuation of the proceeding."

17. Any concern of the objecting employees over the Board's ability to deal fairly with their interest is amply accommodated by placing Board Files No. 0150-79-R and No. 0153-79-R before another panel of the Board. Counsel for the applicant suggested that the earlier panel whose decision was quashed was still seized of the two matters, but we are not of this view. The Court's order quashed the Board's decision and the continuation of the two proceedings will require new determinations in respect of all outstanding issues between the parties. Therefore, we would agree that the Board is seized of these two applications, we do not think a particular panel of the Board is so seized. The applicant is in no way prejudiced by another panel of the Board entertaining its applications; the objecting employees have raised concerns which can be accommodated by the substitution of another panel of the Board; and any panel hearing the two applications will be guided by the parties earlier agreement on the configuration of the two proposed bargaining units.

18. However, with or without this adjustment in the composition of the panel hearing the applications for certification, we see no basis in law or fact for the objecting employees' apprehension of bias. The panel whose decision was quashed did not evidence any particular bias or prejudice in regard to these employees, but instead focussed on what it believed to be technical deficiencies in the document filed by them with the Board. Its view in this respect was wrong and the result was a denial of natural justice, but the decision of the Board contains no hint of animosity towards the objecting employees as individuals and the judgment of the Court does not suggest otherwise. Counsel for the employees took issue with the Board "vigorously" defending its decision before the Courts and suggested that the Board's conduct before the Court somehow added to his clients' fear of bias. The Board and the counsel it retains to act on its behalf are fully aware of the delicate role assigned to them before the Courts. See *Northwestern Utilities Ltd. et al v. City of Edmonton*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161 and *Re Canada Labour Relations Board and Transair Ltd. et al*, [1977] 1 S.C.R. 722, 67 D.L.R. (3d) 421. The Board has an ongoing responsibility in administering the statute, unlike a board of arbitration for example, and has found that its presence in court on an application for review has been of assistance to both the court and the party litigants. Where the Board's counsel oversteps the role a court wishes the Board to play, one would expect that counsel would be then and there advised. In the instant case we understand that the Board's counsel addressed the Court only on the issue of jurisdiction. It would appear that the vigor of our counsel's presentation contributed to the Court's decision to award the applicants costs against the Board. But had the Court intended to rely on counsel's presentation as a reason for not remitting these matters back to the Board, we have no doubt that so serious a disposition would have been explicitly justified. Accordingly, whether counsel's approach was vigorous or not, it cannot be a proper basis for an allegation of apprehended bias and we would simply assure the objecting employees that the particular style of any counsel the Board retains is personal to that lawyer.

19. The respondent relied on *Regina v. Development Appeal Board, Ex parte Canadian Industries Ltd. supra* and *Regina v. Schiff et al, Ex parte Trustees of Ottawa Civil Hospital, supra*. With respect to the former case, we would point out that it does not stand for the proposition that an administrative tribunal cannot continue on with the matters before it subsequent to a court quashing an outstanding decision. In the *Development Appeal Board* case, a tribunal attempted to undertake a second decision on its own initiative and prior to an application being made to the Court. However, the statute did not provide the tribunal with broad powers of reconsideration and, therefore, it was without jurisdiction to cure the earlier defect in its proceedings as it had tried to do by the holding of a second hearing. In *Ottawa Civic Hospital* the Court did consider whether it could remit an arbitration award back to a board of arbitration with appropriate directives, as the result of a suggestion by the respondent to this effect. On reviewing the authorities, and particularly *Re Civic Employees, Union No. 43 and Municipality of Metropolitan Toronto* [1962] O.R. 970, 34 D.L.R. (2d) 711, the Court was satisfied that it could so remit the award for reconsideration and to grant a mandamus for that purpose even though such relief was not requested by the applicant. Indeed, it would appear that a remission of a matter by a court is, in effect, the granting of mandamus whether solicited or not. See Reid and David, *Administrative Law and Practice* (2d ed. 1978) page 350. This was the view taken by the Divisional Court in *Brown v. Waterloo Regional Board of Commissioners of Police* released May 7, 1980 where at page 10 Mr. Justice Reid commented:

"The only basis on which a remission could stand was (apart from

consent) the court's authority to issue a mandamus order. The application did not ask for a mandamus. It was only for certiorari to quash. The court appears to have interpreted the application as if it included a request for a mandatory order."

20. An order quashing an administrative tribunal's decision might definitely dispose of a matter before that tribunal where the very subject matter of the proceeding is beyond the tribunal's jurisdiction as determined by the Court or where a tribunal has so misconducted itself that a fair subsequent hearing cannot occur. Neither of these situations prevail in the instant case. Rather, the failure of the Court to remit the matter to the Board reflects the fact that the objecting employees did not seek this relief and the Court would have been satisfied that the matter could be continued if this is what the applicant trade union wished. Moreover, the absence of additional directives from the Court is a good indication that it did not think the Board needed to adopt a particularly different approach in continuing to deal with the outstanding applications. However, the Board has decided to change the composition of the panel out of an abundance of caution and given the representations of counsel for the objecting employees.

21. The Registrar is therefore directed to schedule Board Files No. 0150-79-R and No. 0153-79-R for hearing in Ottawa before a freshly constituted panel of the Board and to so notify all interested parties. Board Files No. 0074-80-R and No. 0073-80-R will be adjourned pending the resolution of the two earlier applications.

**1499-70-U Remi Bonin, David Charette, Robert McKerral,
Complainants, v. Inco Metals Co., Respondent.**

Health and Safety – Employees refusing to work – Refusal based on factors other than health or safety

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members H. J. F. Ade and H. Simon.

APPEARANCES: *N. Carriere for the complainants; H. Beresford for the respondent.*

DECISION OF THE BOARD; June 3, 1980

1. This is a complaint alleging that the respondent acted in contravention of section 9(1) of *The Employees' Health and Safety Act*, S.O. 1976, c. 79 on July 22, 1979 in that the respondent disciplined the complainants for their refusal to work on July 21, 1979.

2. The incident giving rise to the discipline occurred at the respondent's Copper Cliff Smelter where the complainants were then employed in the Converter Dept. as "punchers". The Converter Dept. consists of a number of converters, some of which are nickel converters and some of which are copper converters. The function performed is that of refining and purifying the metals through the introduction of heat and oxygen-enriched air, which latter is fed, under pressure, into the molten metal through pipes known as "tuyeres". These tuyeres are

required to be kept clear of metal encrustation during the cycle and this is accomplished by the punchers utilizing a five-foot steel bar and a six-pound hammer. Individual converters are 35 feet and 45 feet in length and 13 feet or 15 feet in diameter: copper converters each have 42 tuyeres whereas nickel converters each have 32 tuyeres. The complainants were working on July 21, 1979 on converter #13 which is normally a nickel converter but which was then being used for refining copper because of production back-ups resulting from a preceding legal strike. The evidence was that converter #13 had been used for this purpose from time to time previous to and subsequent to July 21, 1979.

3. The refining process itself consists of two phases. In the first phase reagents are introduced to produce a ferro-silicate slag which is skimmed off leaving a copper sulfide. During this phase the converter is manned by an operator known as a “skimmer” and up to two punchers. During this phase the reaming out of tuyeres is accomplished, in the main, by use of automatic punching machines and manual punching is resorted to only if there is a problem. In the second phase of the process, the operation starts to produce copper and no automatic punching machines are used as the punching tends to be harder and beyond the capacity of the machines. During this second phase it is normal to assign four manual punchers.

4. Manual punchers work on a platform and during punching would be within three feet of the converter shell. The evidence was that internal converter temperatures are 225° F-250° F and, that temperatures outside the converter in the working area generally run 10° F-20° F above ambient temperatures. On regular copper converters there are two fans located at each end of the puncher’s platform to move air across the tuyere area. Converter #13, being a regular nickel converter, was equipped only with a fan at one end of the platform. The air moved by fans comes from an adjoining building and would be at regular ambient temperatures.

5. On July 21st, converter #13 had a regular fan at one end of the platform and had additional improvised air movement equipment at the other hand of the platform, consisting of an air-mover and also a high pressure hose. The temperature of air coming from the air-mover was about 20° F below ambient temperatures, and the air from the air-hose was at ambient temperatures. Ambient air temperatures and humidity at the Sudbury Airport on July 21st were established as:

July 21, 1979	C Temp.	F Temp.	Humidity
4:00 p.m.	28	82.4	40
5:00 p.m.	29	84.2	35
6:00 p.m.	27	80.6	39
7:00 p.m.	27	80.6	39
8:00 p.m.	26	78.8	45
9:00 p.m.	24	75.2	50
10:00 p.m.	22	71.6	60
11:00 p.m.	21	70.00	64
12:00 Midnight	20	68.00	64
1:00 a.m.	19	66.2	68
2:00 a.m.	18	64.4	68

No specific evidence was introduced as to actual temperatures prevailing in the immediate work

area of the complainants or in the work areas at other converters on the day in question, although Peter Jarus, the foreman, testified that in his judgment conditions were the same at all converters. It was stated that converter #13 had been previously used for copper for a period of 4-1/2 years, that some changes had been made to the converter in 1976 and, since that time, there have never been two fans on that converter. He also testified that converter #13 had been used for copper in previous summers.

6. The complainants were assigned to the second shift, commencing at 4:00 p.m. on July 21st. At the start of the shift Mr. McKerral and Mr. Bonin were assigned as punchers on converter #13 along with Messrs. Velez and Lorgi (who are not parties to this proceeding). It should be noted that at the start of this shift the converter was still in its first phase which would normally have resulted in two men being assigned as punchers but, because the automatic punching machines had been removed by the previous shift and manual punching employed, four punchers were required to be assigned. Some time between 5:30 p.m. and 6:00 p.m. two additional punchers (Messrs. Charette and Healey) had been assigned to converter #13. The additional punchers were re-assigned from another converter which was not then operating. The evidence is unclear as to whether such re-assignment came about as a result of a specific request by Bonin to Peter Jarus, the foreman, or whether Jarus made the decision in view of the additional work load due to the condition of the process and the absence of a second fan. The evidence is clear that during the period from 4:00 p.m. to 7:50 p.m. (at which time converter #13 was taken out of production due to other process problems) both Bonin and McKerral (who were at the end of the platform at which there was no fan) had discussions with Jarus regarding the heat and the lack of a fan. Bonin suggested that there was a spare fan available on another converter which Jarus undertook to look into and Jarus endeavoured to do some re-positioning of the air-mover and of the air-hose to provide a better flow of air to the positions where McKerral and Bonin were working.

7. Throughout the period from 4:00 p.m. to 7:50 p.m., the number of punchers present on the platform of converter #13 varied. At the start of the shift there were four punchers (as we have noted above), one of whom, Lorgi, had indicated to Jarus at the start of the shift that he was not feeling well and would like to go home but was prevailed upon to try and see if he could work. The four punchers originally assigned were augmented by Charette and Healey, who arrived some time between 5:30 p.m. and 6:00 p.m. It appears Velez then went to lunch around 6:25 p.m. and according to Bonin and McKerral, Lorgi left the platform at the same time. Jarus testified that it was around 8:00 p.m. that he gave Lorgi permission to go home and we conclude that between 6:25 p.m. and 8:00 p.m. Lorgi was on the premises but not on the platform. Charette suffered a burn at 6:35 p.m. requiring him to report to First Aid, thereby reducing the puncher complement to three, and at 7:15 p.m. Healey suffered a burn, also requiring his reporting to First Aid. The active puncher complement then continued at two for a short period until Velez returned from lunch shortly after Healey's injury. Both McKerral and Bonin testified that neither Healey nor Charette returned to the platform before the converter was shut down at 7:50 p.m., although the First Aid attendant who treated them testified that neither injury in his judgment required a modified work slip recommending placement on other than regular work and he had assumed they would return to work, which would have been the usual procedure.

8. During the period from 7:50 p.m. to 9:30 p.m. converter #13 was shut down and the punching crew (except for Lorgi) were in the lunchroom. At 9:30 p.m. Jarus went to the lunchroom and explained that he had investigated securing a fan and had been advised by the elec-

trician that it would require the running of a cable which would have to be done on the day shift next day. Jarus then asked them to return to work, and McKerral raised the question, “what if we don’t go back” to which Jarus stated he implied that they had a choice to punch or go home. Jarus stated there were punchers from other crews in the lunchroom who had completed their work and there was a certain amount of “razzing” going on and that he interpreted McKerral’s question against this background. Jarus states he then went to his office which adjoins the lunchroom. Shortly after, McKerral and Bonin came to his office with their lunch pails and stated that they chose to go home. Jarus stated that he then explained that on their return they would be penalized for refusing to work, to which they replied that “they understood”. On cross-examination Jarus stated that he didn’t inquire of McKerral and Bonin why they were leaving and that he could not recall anything being said about fans or about heat.

9. Jarus then returned to the lunchroom to see if the others had returned to work and found Charette and Healey still there. They both stated they were injured and should not have to go back to work. Jarus stated that he had no indication from First Aid that they should be placed on modified work and sent them back to the First Aid attendant to secure such slips. Wright, the First Aid attendant, testified that Healey and Charette again saw him and sought modified work slips. Wright informed them that in his opinion they were not justified and that it was “up to their foreman”. In response to the question, “who has the final say as to whether an injured employee can do his normal work”, Wright responded, “actually the employee does – that has always been the case”. Wright stated that neither of them raised the question of heat as a reason for not wanting to work.

10. On Healey and Charette’s return to Jarus’ office, Jarus stated that he asked them to return to work. According to Jarus, Healey stated he was going home and “would get paid for it anyway”. Jarus stated they would be penalized on their return for refusing to do assigned work and they departed. Jarus stated that neither one of them raised the issue of heat in connection with their refusal to work, nor gave any reason other than their injuries.

11. Jarus testified that at 9:30 p.m. Velez did return to the punching platform as did a replacement for Lorgi which Jarus arranged.

12. Bonin’s testimony regarding the 9:30 p.m. incident is that Jarus said “#13 punchers go back up and start to punch because the shell is going back on the line”. Bonin then asked about the fan and told Jarus that he wouldn’t go up unless the fan was installed because it was too hot back there. Bonin stated that Jarus then said there would be no fan because the electrician said it would take a whole shift to install it, to which McKerral and Bonin responded that they were not going back. Jarus is said to have stated, “you’ve got a choice, either punch or go home”, so McKerral and Bonin elected to leave.

13. There was some dispute as to whether in the lunchroom encounter Jarus had sent Charette and Healey to First Aid prior to telling the crew to return to work. We are satisfied that Charette and Healey were present at the time of the instruction to return to work and that their referral to First Aid occurred as outlined in Jarus’ evidence. There is also the conflict as to whether Jarus explained about the fan prior to ordering the men back to work or whether the sequence of events was as testified to by Bonin and McKerral. Regardless of the sequencing, we are satisfied that in the lunchroom discussion Bonin and McKerral made known their position regarding the heat and the lack of a fan. Jarus stated that at no time during the events of

July 21st did he interpret the complaints as being based on a claim of unsafe conditions, and that no one mentioned the word "safety".

14. Jarus testified that converter #13 was not in fact put back into operation that night but that it was operative on the next shift, and that the fan was not installed until July 23rd. (In fact the installation was not completed until July 25th.) Jarus left a note for the foreman with whom the complainants were scheduled to work next day, outlining what had happened and recommending the complainants be given disciplinary notices on his behalf. Such notices were issued on July 22nd based on their refusal to work.

15. Lindsay, superintendent of converters, first learned of the events of July 21st when he came into work in the morning of July 23rd and saw copies of the disciplinary notices issued to McKerral, Charette and Bonin. Lindsay made inquiries of two general foremen who informed him that the converter #13 operation had been "screwed up" in the Saturday day shift, that only one fan was hooked up and, that part of the problem seemed to stem from insufficient fan capacity. Lindsay decided to interview the employees individually. He testified that both McKerral and Bonin in effect said that when they had come to work the converter had been left in a "hell of a mess" and they had to do extra work because of the previous shift's bad operating practices. Lindsay states that Bonin and McKerral made some comment about the lack of a fan, but neither made reference to heat until after Lindsay introduced the topic, and no one made any reference to it being too hot to work. Lindsay stated that at no time was any comment made about safety, and that it was not until the second step of the grievance procedure that the company became aware that the refusal to work was being justified on safety grounds.

16. The first question to which the Board must address itself is whether the refusal of the complainants to work on July 21, 1979 was an exercise of the right created by section 2 of the Act which provides:

"Where an employee in a work place was reasonable cause to believe that a machine, device or thing is unsafe to use or operate because its use or operation is likely to endanger himself or another employee or a place in or about a work place is unsafe for him to work in, or the machine, device, thing or place is in contravention of *The Industrial Safety Act*, 1971, *The Construction Safety Act*, 1973 or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, the employee may refuse to use or operate the machine, device or thing, or work in the place."

The question here is whether the employees had reasonable cause to believe that their work place was unsafe. An affirmative answer to that question establishes that a refusal to work based on that belief is a refusal in compliance with the Act.

17. Section 3 of the Act provides as follows:

"(1) Where an employee in a work place refuses to use or operate a machine, device or thing or refuses to work in a place therein because he has reasonable cause to believe that the machine, device or thing is unsafe to use or operate because its use or operation is likely to

endanger himself or another employee or the place is unsafe for him to work in, or the machine, device, thing or place is in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act* or any regulations thereunder, as the case may be, he shall forthwith report the circumstances of the matter to his employer or the person having control and direction over him who shall forthwith investigate the report in the presence of the employee and, if there is such, in the presence of either a health and safety representative, a committee member who represents employees, or a person authorized by the trade union that represents the employee.

- (2) Where the employer or the person having control and direction over the employee disputes the report or takes steps to make the machine, device, thing or place safe or comply with *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, and the employee has reasonable cause to believe that the machine, device or thing is or continues to be unsafe to use or operate because its use or operation is likely to endanger himself or another employee or the place is or continues to be unsafe for him to work in or the machine, device, thing or place is or continues to be in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, he may continue to refuse to use or operate the machine, device or thing, or work in the place unless a collective agreement binding the employee expressly provides otherwise.
- (3) Where the employee continues to refuse to use or operate the machine, device or thing, or work in the place or having returned to work in compliance with the express provisions of a collective agreement binding the employee files a grievance concerning his right to continue to refuse to use or operate the machine, device or thing or work in the place, the employer or person having control and direction over the employee shall notify an appropriate inspector or an engineer, as the case may be, who shall investigate the matter in the presence of the employer or the person having control and direction over the employee, the employee and, if there is such, either a health and safety representative, a committee member who represents employees or a person authorized by the trade union that represents the employee.
- (4) The inspector or engineer shall, following his investigation, make a decision whether the machine, device or thing is unsafe for the employee to use or operate or the place is unsafe for the employee to work in or the machine, device, thing or place is in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*

or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be.”

In the instant case the prescribed investigations by the employer did not take place and neither was an appropriate inspector or engineer notified. The employer in this case explains the non-implementation of section 3 on the grounds that he had no reason to believe at the time that the refusal of employees to work was based on the safety of the work place.

18. Prior to the enactment of the present legislation, an employee covered by a collective agreement which contained a just cause provision for discipline who was disciplined for refusal to perform work based on an apprehended danger to health or physical well-being, was required, in contesting such discipline to establish that his refusal to work was justified. The arbitral jurisprudence looks to the reasonableness of the apprehension of danger as establishing justification, and has established a number of criteria by which such reasonableness can be tested. Such criteria are well-summarized in *Re Steel Co. of Canada Ltd. and United Steelworkers, Local 1005*, 5 L.A.C. (2d) 315, at page 318 where it is said:

“From these we take the following propositions against which to test the grievor’s evidence and argument. These are: First, did he honestly believe his health or well-being was endangered? Secondly, did he communicate this belief to his supervisor in a reasonable and adequate manner? Thirdly, was his belief reasonable in the circumstances? Fourthly, was the danger sufficiently serious to justify the particular action he took?

19. The respondent argues that the Board, in determining whether under section 2 of the Act an employee had “reasonable cause to believe” that the work place was unsafe, should be guided by these criteria. In our view, the first three of the above outlined criteria relates to the holding of a reasonable belief of apprehended danger as does section 2 of the Act. The criteria contain a logical persuasiveness of approach which can be of assistance in arriving at a conclusion as to whether there has been, initially, an exercise of a section 2 right. The fourth enumerated criterion, in our view, goes to the question of whether objectively, despite the holding of a reasonable belief of apprehended danger, the circumstances justified an employee refusal to work. This is the question to which section 3 of the Act is addressed by prescribing certain steps to be taken following the initial employee refusal and prompt informing of the employer. The steps prescribed in section 3 to be taken following the first refusal assure the injection of evaluations, additional to that of the employee, as well as the potential of physical changes in the condition complained of, such as may cause the testing of the employee’s continued belief against a changed set of circumstances to be made. In our view, considering the general thrust of the legislation, we are of the opinion that an employee can be found to be exercising his section 2 right under the Act in his refusal to work despite the fact that further evaluation of the situation can lead to a more objective conclusion that there is not in fact a potential of danger. This is in keeping with the object of the Act which is to preclude employee injury. In the instant case, we are concerned only with the circumstances existing at the time of the actual refusal: the employer never implemented the section 3 steps because, in his view, there was nothing in the employees’ complaints which caused or ought to have caused him to conclude that the employees were apprehensive of the safety of the work place.

20. There may be conditions in the work place, or in connection with a machine, which have an obvious potential for endangering employees that to merely draw attention to the

existence of such condition makes obvious the underlying apprehension of the employee for his safety. There may also be conditions in the work place which are part of the normal and accepted safe working environment but which, when altered, in degree or quality beyond some point, may in fact endanger the health or well-being of employees. It is this latter category with which we are here concerned insofar as the complainants McKerral and Bonin are concerned. (We shall deal separately with the complainant Charette later.) In essence, the complainants state that they refused to work because of unusual heat and the lack of a fan combined with abnormal individual work loads arising from non-standard process conditions, and that their reasons were communicated to their supervisor. They argue that these conditions gave them reasonable cause to believe that the work place was unsafe.

21. We accept the fact that July 21st was a hot summer day and that the ambient temperatures would impact on the work place. Those temperatures reached a high of 84.2° F at 5:00 p.m. that day and fell off steadily to 71.6° F at 10:00 p.m. The temperature was in between 75.2° F and 71.6° F at 9:30 p.m. when the complainants refused to work. We note that in the Smelting Dept. there were nickel converter crews at work and there was no evidence of work interruptions or complaints about the heat amongst those crews despite the opinion of Jarus that he found conditions to be comparable on all converters. We must also note that while three other employees (Lorgi, Healey and Charette) who worked on converter #13 did not return to work at 9:30 p.m., their stated reasons for not doing so did not relate to the heat condition. Velez, the other member of the converter crew, did work through the first half of the shift and did return to the platform at 9:30 p.m. as instructed. Additionally, we conclude from the evidence that over the years it has been very rare – if indeed it ever happened – for smelter punchers to cease work because of heat conditions.

22. The lack of a fan at the end of the platform at which Bonin and McKerral worked was not an abnormal operating condition. The evidence was that revisions were made to converter #13 in 1976 and that since that time the converter has not been equipped with a second fan. The evidence also was that converter #13 had been used for copper conversion during the summer months over that period. Counter-balancing the lack of a fan were two pieces of equipment, an air-mover and a high pressure hose. According to the evidence, the air-mover would have an air displacement capacity relatively equal to that of a fan and, additionally, would provide a cooling effect of about 20° F, whereas the fan would provide no cooling effect. The air-hose provided additional air displacement capacity. Nonetheless, it must be noted that the foreman, Jarus, did make reasonable efforts to secure the installation of a second fan which could not be accomplished on that shift.

23. In regard to the condition of the process and the manning of the operation at converter #13 on July 21st, there is no doubt that the work was more arduous than normal, and this too was the subject of discussion between the complainants and Jarus during the first half of the shift. As a result of those discussions another two employees were assigned to the punching operation, although it must be noted that the actual size of the crew at work varied over the period.

24. The refusal to return to work at 9:30 p.m. was stated to be because it was too hot to work without a fan. However, in cross-examination, Bonin conceded that despite the absence of a fan he would have returned to work at 9:30 p.m. had he been aware that Jarus had already arranged a replacement for Lorgi who had gone home ill. In the light of the foregoing, the events between the start of the shift (4:00 p.m.) and the time the process was shut down and the

employees went to the lunchroom (7:50 p.m.) do not lead the Board to conclude that the complainants had a sense of potential danger to them and they did not have reasonable cause to believe that the work place was unsafe for them to work. There is, however, one other matter to be considered, and that is whether there was some additional factors bearing particularly on the safety of the complainants, and which did not exist for other employees in the same or comparable work environment.

25. It is generally recognized that heat and humidity impact unequally on individuals and indeed that similar conditions of heat and humidity impact differently on the same individual on different occasions. The subjective view of the individual in respect to his physical well-being, in these circumstances, may well be a factor in determining whether he had reasonable cause to believe that the work place was unsafe to him.

26. Both Bonin and McKerral gave testimony that they were feeling tired, weak, (and in Bonin's case, dizzy) and that this was the underlying reason for refusing to return to the work place. Mr. Rocco Tummino, called by the complainants, had been a puncher for 7-1/2 years and recalled some years back when he himself was feeling dizzy, sat on a bench for a period and apparently fainted. He also testified that he has experienced other punchers complaining of dizziness and "told them to stay out of the area, have a short rest and come back". The question was put to Tummino, "if a puncher is feeling dizzy does he sit down?", to which he responded, "Yes, get out of the area. A puncher should know that". We do not view this testimony in conflict with that of Jarus, the foreman, who testified that in his over twenty years experience, he had no knowledge of a puncher having to go home because of the heat; nor do we view it in conflict with the testimony of Wright, the First Aid attendant for the past 2-1/2 years, who testified that in that time he had never had occasion to treat anyone for complications resulting from punching while it was hot, nor had he ever seen a puncher who was refusing to work because of the heat. Wright also testified that he himself had been employed as a puncher for 1-1/2 years and that the conditions in summer heat can be "rough" and that while he had complained about the heat he had never refused to punch.

27. We conclude that "dizziness" is a known phenomenon in punching and that any puncher so affected should sit down and rest and that Bonin was well aware of this procedure, and that such procedure is a self-help remedy designed to preclude the individual workman working under conditions which, because of his individual physical condition, make it unsafe for him to continue, even though the conditions of the work place is not similarly affecting other employees. In a given case such conditions could warrant a refusal to work, but in the instant case it did not lead to such a refusal up to 7:50 p.m., not did it assume such proportions in the minds of the complainants as to cause them to mention it to Jarus over that period. Further, it was not identified as an underlying reason for the refusal to work at 9:30 p.m. that they had been absent from their work stations for one hour and forty minutes, and in repeating their complaint about the absence of a fan and the heat that they were obviously relying on their experiences up to 7:50 p.m. The Board can only conclude that there was not, at the time of the refusal, present in the minds of the complainants an apprehension of their physical well-being being endangered, and that the testimony is more in the nature of a rationalized excuse after the event.

28. This conclusion that the refusal to work was based on factors apart from the safety of the work place, is supported by the evidence that the first time the company became aware that there was a reliance on unsafe working conditions as a justification for the refusal was at

the second step of the grievance procedure. It was clear to the Board that the complainants at the start of their shift on July 21st were quite upset by the production mess they had inherited from the preceding shift, and particularly so in that it was going to require continuous hand-punching by them throughout their shift. This, together with the fact that they knew they were facing a short turn-around shift (i.e., to finish work at midnight on Saturday and to report for their next shift at 8:00 a.m. on Sunday), and the “razzing” in the lunchroom about having to return to work by crews who had then completed their assignments for the shift, could well have been the cumulative reasons for refusal to work.

29. The Board concludes, on all the evidence before it, that the complainants, Bonin and McKerral, did not have reasonable cause to believe that the work place was unsafe for them to work in, and that therefore their refusal to work was not an act in compliance with the legislation. The complaints are dismissed.

30. We turn to the complainant Charette. According to Wright, First Aid attendant, Charette was seen by him at 6:45 p.m. on July 21st at which time Charette brought with him a routine inter-company form identifying that he had suffered a burn to the neck while punching on converter #13 as a result of hot scrap flying off his punching bar and down the back of his neck. Wright states that he talked with Charette about the injury (which in Wright’s view was minor) and that Charette viewed the injury in a mirror. In Wright’s judgment the injury was not such as to cause him to recommend modified work for Charette. Wright assumed that following the treatment Charette would return to work and Jarus testified that in the absence of a modified work recommendation, such would be the normal thing. However, McKerral and Bonin testified that Charette did not return to the punching platform following his injury.

31. Charette was present in the lunchroom at 9:30 p.m. when Jarus came to instruct the crew to return to work and was still there at about 9:35 p.m. when Jarus returned to the lunchroom to see if all the men had returned to work. Jarus asked why they were not at work and Charette said he was injured. Jarus stated that he did not have a modified work slip from First Aid and that Charette (and Healey who was in the same circumstance) would have to return to First Aid, and he gave them permission to go.

32. Wright, the First Aid attendant, testified that he saw Charette for the second time that night and that Charette asked for a modified work slip, but did not indicate in any way that his injury was bothering him. Wright advised that he did not recommend modified work and that Charette should speak to his shift boss. Wright stated that neither Charette nor Healey said anything at all about problems of heat or about safety. Wright received a subsequent phone call from Jarus inquiring as to whether Wright recommended modified work for Charette and Wright stated that he did not recommend it.

33. Jarus testified that he had called Wright (as related above) when Healey and Charette returned to his office from First Aid and that Wright told him that in his opinion Charette’s injury was very minor and he could do regular duty. Jarus then asked Charette (and Healey) to return to work, to which Healey stated he would go home first and would get paid anyway; Jarus states Charette said nothing, and “sort-of” followed Healey out. Jarus states that he told them they would be penalized on return for refusing to do assigned work. Jarus testified that in this conversation neither Healey nor Charette raised any question about heat or any reason other than their injuries; Lindsay in his testimony states that both Healey and Charette told him when they were interviewed that “they didn’t punch because of injuries”.

When Lindsay stated to Charette that his injury was a minor one, Charette said "the sweat would aggravate the burn and as such he chose to go home". Lindsay testified that during this interview Charette made no mention about heat or about safety.

34. Charette was not called to give evidence on his own behalf.

35. By any standard, it is difficult to infer that Charette had reasonable cause to believe that he held that belief at the time of his refusal. He never raised any aspect of the work place as relating to his refusal to work, but in his discussions with Wright and with Jarus (in the lunch-room) related his desire not to return to work due to his injury. This contention in the interview with Lindsay that the injury could have been aggravated by sweat, in the face of Wright's testimony, has a favour of *post facto* justification. We do not discount that there may be circumstances in a given case where a suffered injury might well form a basis for a reasonable belief that a work place is unsafe for the employee to work in, but this is not the case. We conclude that Charette had no reasonable cause to believe that the work place was unsafe for him and his refusal to work was not in compliance with the Act.

36. Charette's complaint is dismissed.

0186-79-R Christian Labour Association of Canada, Applicant, v. **Master Insulation Company Limited**, Respondent, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Intervener.

Representation Vote – Right of access – Employer refusing to disclose job-site locations – Whether Union entitled to information – Board directing disclosure

BEFORE: R. A. Furness, Vice-Chairman, and Board Members O. Hodges and R. W. Redford.

DECISION OF THE BOARD; June 17, 1980

1. In a decision dated February 1, 1980, the Board directed the taking of a representation vote. The respondent did not have any employees in the bargaining unit on February 1, 1980. Subsequently, a representation vote was conducted by the Board on March 21, 1980. In a decision dated May 21, 1980, the Board set aside that representation vote.

2. It appears that the respondent may now have employees who are included in the bargaining unit defined in the decision of the Board dated February 1, 1980. Having regard to the representations before it, the Board directs that a representation vote be taken of the employees in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

3. The persons who desire to vote in the representation vote are to be permitted to vote by means of segregated ballots. The Registrar is directed to cause the ballot box to be sealed pending a further direction by the Board.

4. Arrangements have been made for conducting the representation vote. However, counsel for the intervener has requested the locations, job sites and projects at which the employees who are affected by this application are working. The respondent's response has been that neither the applicant nor the intervener is to be advised of the location of any such locations, job sites and projects because the respondent does not wish to have the employees interfered with in any way whatsoever. It appears that counsel for the intervener has requested that the intervener be given an opportunity during lunch hours or coffee breaks or before or after work, to speak to the employees, and for that reason requested addresses and locations of sites and projects at which these employees are working. The respondent has informed the Board that its response was to advise the applicant and the intervener that they would be given opportunity to meet in the absence of and free from any interference by the respondent at the respondent's address, at any time they chose on notifying the respondent of the time, during which full opportunity would be given to meet with the employees for the purpose of electioneering. The respondent has advised the Board that while counsel for the intervener wish to grasp this opportunity, he still wishes to maintain the intervener's position that it retained its right to visit the employees at the job site. The respondent has also advised the Board that in view of that impasse, no addresses or locations of job sites have been made available to either the applicant or the intervener and, as understood by counsel for the respondent, no attempt is being made by either of them to meet with the employees at the respondent's offices.

5. The intervener has advised the Board of its challenges to the list of voters and has alleged that the two employees on the list of voters were not hired through the intervener's offices in violation of the respondent's contractual obligations with the intervener, and consequently are unknown to the intervener. The intervener has advised the Board that it has requested the respondent to advise of the location of job sites where the employees would be engaged so as to communicate with the employees and campaign in the representation vote. In a letter dated June 10, 1980, the intervener has stated:

"The Respondent Company refused to divulge this information claiming that the Intervener would interfere with the working activities of the employees. Notwithstanding an offer of a written undertaking from the Intervener that its representatives would only approach the employees either before or after work, or during their morning or afternoon breaks or during their lunch breaks, the Respondent Company continued to refuse to divulge the location of the employees. The Respondent Company did offer both the Applicant and the Intervener an opportunity to meet with the employees once any morning at its premises. The Intervener accepted this offer but took the position that its right to campaign and its access to the employees could not be restricted only to terms and conditions unilaterally set by the Respondent Company and as a result continued to request the job locations of the employees. The Intervener was still prepared to give its written undertaking not to interfere with the working activities of the employees. Nevertheless the Respondent Company then refused to both provide an opportunity of access to the employees at its premises and to reveal the job locations of the employees. In

fact, the Respondent Company specifically advised the Intervener that if any of its representatives were found on the Respondent's premises, the police would be summoned.

In these circumstances, the Intervener submits that it is being deprived of a fair opportunity to campaign in the said representation vote and requests that the Board forthwith direct the Respondent Company to advise all parties of the job locations of the subject employees."

6. When an application for certification is filed, the applicant is aware of the location of the job site and that information is available to any trade union which desires to file an intervention. In a representation vote the applicant and the intervener, if any, are invariably aware of where the job site is located. This enables the trade unions to satisfy themselves of the identity, number and the type of work performed by the employees who are arguably in the bargaining unit or the voting constituency. In our view, this is an integral part of a representation vote. The offer of access by the respondent does not constitute adequate availability of information to the trade unions in connection with the representation vote. We note that the applicant has offered to confine itself to certain limitations in approaching the two employees who are affected by the result.

7. Having regard to the foregoing and to the provisions of sections 91(12) and 92(2)(f) of the Act, the Board directs the respondent to inform the applicant and the intervener of the location of the job site or site where the two employees are working. If the respondent does not promptly provide this information on request, the Registrar is authorized and directed to release to the applicant and the intervener, the names and addresses of the two employees.

**0440-80-U Mechanical Contractors Association Ontario, Applicant,
v. United Association of Journeymen and Apprentices of the Plumbing
and Pipe Fitting Industry of the United States and Canada, Local 463,
and C. Burrows, Respondents.**

**Construction Industry – Strike – Minority of affiliated bargaining agents engaging in strike
– Strike timely – Effect of section 134a – Whether unlawful**

BEFORE: R. A. Furness, Vice-Chairman.

APPEARANCES: *R. A. Werry and G. Opacic for the applicant; H. M. Pollit, Chris Burrows and Don Ransberry for the respondents.*

DECISION OF THE BOARD; June 4, 1980

1. The applicant has applied for relief under section 123 of *The Labour Relations Act* and has made the following allegations in its complaint:

"The applicant is the designated Employer Bargaining Agency for the Plumbing and Pipe Fitting Industry in the industrial, commercial and institutional sector of the Construction Industry in the Province of Ontario and is currently engaged in negotiations with the Ontario Pipe Trades Council, (the designated Employee Bargaining Agency) for the renewal of the Provincial Collective Agreement. The Respondent United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 is an affiliated Bargaining Agent of the Employee Bargaining Agency. On May 22, 1980, 3 members of Local 463 employed by George Hamers Limited, 14 members of Local 463 employed by Goodfellow & Dougherty Limited, 57 members of Local 463 employed by Harold R. Stark Limited and 9 members of Local 463 employed by Ford Mechanical commenced a strike. The striking employees who were all working in the industrial, commercial and institutional sector were instructed by the Respondent Burrows to stay off work commencing on the 22nd day of May, 1980, and to continue to stay off until further word from the Union business office. A strike was not called or authorized by all of the affiliated Bargaining Agents represented by the Employee Bargaining Agency, for all employees working in the industrial, commercial and institutional sector represented by the said affiliates, thereby making the strike called by Burrows and engaged in by members of Local 463 unlawful."

2. The respondents in their reply denied that they or either of them had called or authorized, counselled, procured, supported or encouraged an unlawful strike and put the applicant to the full proof of its allegations.

3. It was agreed that a strike commenced on May 22, 1980, and that it was continuing on June 2, 1980, the date of the hearing. At the outset, the parties agreed that the question to be answered was whether the strike was unlawful under the Act.

4. Negotiations for a new collective agreement were taking place in Toronto during May of this year. The new collective agreement which was being negotiated was between the Mechanical Contractors Association of Ontario (the designated employer bargaining agency) and the Ontario Pipe Trades Council (the designated employee bargaining agency). The affiliated bargaining agents represented by the Ontario Pipe Trades Council (the "Council") were in a position to call or authorize a lawful strike, subject to the provisions of section 134a(1), on May 22, 1980.

5. Christopher Burrows, who is the business manager of the respondent trade union, gave evidence that he is an affiliated member of the Council and also a member of the Council's steering committee. Mr. Burrows identified the minutes of the steering committee. Mr. Burrows identified the minutes of the steering committee for May 21, 1980. The minutes indicate that the tentative date for the strike was May 22, 1980. The various affiliated bargaining agents who were represented at the meeting of the steering committee reported on their present position with respect to the proposed strike on May 22, 1980. A motion was placed before the meeting which stated, "The official strike date will be Thursday, May 22nd and all locals be notified to comply". The motion was voted upon and was passed with one vote in opposition. The minutes indicate that prior to the vote representatives of Locals 46 and 67 of the United

Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada anticipated that they might not be able to have their members on strike as early as May 22, 1980.

6. The members of the respondent trade union had conducted a strike vote on May 20, 1980, and had voted ninety-eight per cent in favour of a strike. At this point, Mr. Burrows informed the membership that they were in a position to strike on May 22, 1980, unless he told them differently. A memorandum of agreement was reached between the designated bargaining agents on Sunday, May 25, 1980. The respondent trade union conducted its ratification vote on Saturday, May 31, 1980, and the ratification votes of the other affiliated bargaining agents will be completed on June 5, 1980.

7. The evidence established that on May 22, 1980, the respondent trade union and three other affiliated bargaining agents commenced a strike in the industrial, commercial and institutional sector of the construction industry and that other affiliated bargaining agents did not engage in a strike on that date. Indeed, the Board finds on the basis of the evidence before it that some of the affiliated bargaining agents did not call or authorize or engage in a strike in the industrial, commercial and institutional sector of the construction industry either on May 22, 1980, or at any time subsequent to that date. The respondent trade union and its members remained on strike in the industrial, commercial and institutional sector of the construction industry on June 2, 1980, the date of the hearing of this application. When the memorandum of agreement was made on May 25, 1980, the chairman of the employer bargaining agency asked the chairman of the employee bargaining agency for an understanding that the affiliated bargaining agents be instructed to return to work. The chairman of the employee bargaining agency agreed to this request.

8. The applicant argued that the intent of section 134a(1) was to make selective strikes, as opposed to general strikes unlawful in the industrial, commercial and institutional sector of the construction industry in the circumstances of this application. The applicant also argued that the effect of section 134a(1) was to require all of the affiliated bargaining agents to participate in a strike in the circumstances of this application.

9. The respondents argued that the wrong parties had been named as respondents in this application. It was the position of the respondents that Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its business manager should be the respondents in this application because these two parties appeared to have broken the law. The respondents emphasized that the employee bargaining agency had called or authorized the strike and that there was no evidence that any of the affiliated bargaining agents had not called or authorized a strike of its members. The respondents also argued that the intent of section 134a(1) is to prevent independent or "wild cat" action by one affiliated bargaining agent and not to intrude into the circumstances of this application.

10. In reply, the applicant agreed that the calling or authorizing of a strike is a matter of evidence. However, the applicant argued that where it appears that there has been a violation of section 134a(1) the onus shifted to the respondents to lead evidence that their conduct was not a violation of this section. In the alternative, the applicant argued that following the undertaking of May 27, 1980, there was no longer a lawful strike.

11. Sections 123 and 134a(1) state:

“123.-(1) Where on the complaint of an interested person, trade union, council of trade unions or employers’ organization the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike, it may direct what action if any a person, employee, employer, employers’ organization trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

(2) Where on the complaint of an interested person, trade union, council of trade unions or employers’ organization the Board is satisfied that an employer or employers’ organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or than an officer, official or agent of an employer or employer’s organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out, it may direct what action if any a person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.

(3) The Board shall file in the office of the Registrar of the Supreme Court a copy of a direction made under this section, exclusive of the reasons therefor, in the prescribed form, whereupon the direction shall be entered in the same way as a judgment or order of that court and is enforceable as such.

134a-(1) Where an employee bargaining agency desires to call or authorize a lawful strike, all of the affiliated bargaining agents it represents shall call or authorize the strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 106, and no affiliated bargaining agent shall call or authorize a strike of such employees except in accordance with this subsection.”

12. There is no dispute that the applicant is an interested person or employer’s organization within the meaning of section 123 of the Act. There is no dispute that the respondent trade union and its business manager as its officer, official or agent within the scope of his authority to act on behalf of the respondent trade union called or authorized a strike. The question to be answered is whether such a strike was unlawful having regard to the provisions of section 134a(1) of the Act. There is no doubt that the Council as the employee bargaining agency desired to call or authorize a lawful strike. However, there is no evidence whether all of

the affiliated bargaining agents represented by the Council called or authorized a strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry. There is evidence before the Board that the respondent trade union called or authorized a strike.

13. The intention of section 134a(1) is to set forth circumstances where a strike which would otherwise be lawful under the Act becomes unlawful under certain circumstances. Clearly, section 134a(1) addresses itself to selective strikes and section 134a(2) addresses itself to selective lock-outs. The intent of section 134a is to preserve conditions of uniformity where lawful strikes and lawful lock-outs may be called or authorized and to prevent certain employees, trade unions and employers from being placed in a position of disadvantage relative to other employees, trade unions and employers, thereby affected in the industrial, commercial and institutional sector of the construction industry. In this manner, the cohesiveness of bargaining agencies may be better preserved.

14. In this application a minority of the affiliated bargaining agents engaged in a strike and it appears that a small minority of the employees who are affected by the bargaining in the industrial, commercial and institutional sector of the construction industry engaged in a strike. It appears that the representatives of the steering committee did not adequately appreciate the difficulties that some affiliated bargaining agents might encounter in calling or authorizing a strike on such short notice. In the Board's view, it is no defence to an alleged violation of section 134a(1) to plead that the other affiliated bargaining agents did not do what they were either supposed or believed to be doing. A degree of co-ordination is essential in the calling of strikes if section 134a(1) is not to be violated. The Board emphasizes that it is not dealing with this application on the basis that not all of the affiliated bargaining agents called or authorized a strike on May 22 or 23, 1980. The Board recognizes that in certain circumstances all of the affiliated bargaining agents may not be able to call or authorize a strike on the same day. It all depends on the facts of any given case. In this application it is clear that the respondents have continued to engage in a strike for almost two weeks when they have been well aware that some affiliated bargaining agents have either not called or authorized a strike at all or have called or authorized a strike for a much shorter period of time.

15. The Board does not agree with the respondents' contention that Local 46 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada has violated section 134a(1) in the circumstances of this application. While that affiliated bargaining agent may be subject to certain rights and duties with respect to the Council and other affiliated bargaining agents, the Board is not prepared to find that that affiliated bargaining agent has violated section 134a(1) on the facts of this application. The Board, however, expresses no opinion of a situation where a minority of affiliated bargaining agents and a minority of employees thereby affected have remained at work while a majority of affiliated bargaining agents and a majority of employees thereby affected have engaged in a strike in circumstances similar to the facts of this application. This is a case of first impression and no doubt different facts and arguments will lead to further elucidation of section 134a(1).

16. The Board finds that the respondents have, in the circumstances of this application, violated the provisions of section 134a(1) of the Act in that they have called or authorized an unlawful strike in the industrial, commercial and institutional sector of the construction industry. The Board further finds that Christopher Burrows has counselled, procured, sup-

ported or encouraged an unlawful strike in the industrial, commercial and institutional sector of the construction industry. Pursuant to section 123 of the Act and in the exercise of its discretion, the Board issues the following direction:

1. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, and C. Burrows shall forthwith cease and desist from calling or authorizing an unlawful strike in the industrial, commercial and institutional sector of the construction industry.
 2. C. Burrows shall forthwith cease and desist from counselling, procuring, supporting or encouraging an unlawful strike in the industrial, commercial and institutional sector of the construction industry.
 3. C. Burrows shall forthwith inform the employees who are engaging in an unlawful strike in the industrial, commercial and institutional sector of the construction industry that they are engaging in an unlawful strike.
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**2117-79-U The International Woodworkers of America, Complainant,
v. Mount Forest Caskets Limited, Respondent.**

Discharge for Union Activity – Board finding contravention of Act – Ordering compensation, reinstatement and posting of notices

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *J. Sack, H. Goldblatt, S. Shrybman and Harold Sachs for the complainant; Joseph Carrier, Donald Haddy and Carl Quantz for the respondent.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; June 3, 1980

1. This is a complaint under section 79 of *The Labour Relations Act* in which the complainant alleges that the grievor, Roy Norman Rabe, was discharged contrary to the provisions of sections 3, 56, 58(a) and (c) and 61 of the Act.

2. The grievor was hired by the respondent in July of 1979 to work in the cabinet room. His job of fitting a number of parts together to build hardwood lids ("plates") for caskets produced by the respondent was one of the skilled jobs in the plant. Two weeks after he was hired, the grievor advised management that he had received another offer of employment at a higher rate. As a result, management increased his rate from \$3.50 to \$4.50 per hour.

3. The plates built by the grievor consist of three different types – “regular” rectangular plates, “oversized” plates and octangular plates. Although the amount of time required to properly build each of these types of plates was a matter of dispute between the parties, it was not disputed that it takes longer to build an oversized plate than a regular plate, and longer still to build an octangular plate.

4. In response to requests by management for increased production, the grievor, who averaged approximately six plates per day at the commencement of his employment, increased his production to approximately eight plates per day and then further increased it to about ten plates per day in December of 1979. In mid-January 1980, William Watts, the working foreman who supervised the grievor, asked the grievor to increase his production to twelve plates per day. In response to this, the grievor expressed disbelief that such a high rate of production was possible. However, the requested rate was confirmed by Donald Haddy, the President and General Manager of the respondent.

5. One morning during the second week of January, Carl Quantz, the Assistant General Manager of the respondent, asked the grievor at 8:45 in the presence of Watts if the grievor could finish the plate on which he was working and also make a second plate by break-time at 9:55. When Quantz told Watts that the former could make three plates in an hour, the grievor became quite angry and swore at Quantz in the course of expressing the view that no one could build plates that quickly. The grievor then put on his coat and began to leave. However, Quantz persuaded the grievor to remain by telling him that he had meant that he could make three regular plates in an hour, not three of the octagonal type of plates (on which the grievor was working at the time of this incident).

6. The grievor testified that prior to this incident, other employees in the plant had asked him to organize a union but he refused. It was his evidence that it was on the morning of his argument with Quantz that he decided to bring in the union. He contacted Harold Sachs, an organizer for the complainant, on January 21, 1980. After speaking with Sachs, the grievor engaged in union activity in support of the complainant by speaking to many employees, soliciting membership cards and calling on or about January 23, 1980, a meeting of employees to be held at his home on February 2, 1980. At that meeting, a number of employees joined the complainant and a union committee was formed with the grievor as chairman.

7. On February 1, 1980, Haddy called the grievor into his office and, in the presence of Watts, showed him a sheet of efficiency calculations. Although the grievor did not understand the calculations, he did agree that the times on which one of the methods of calculation was based would be reasonable if the saw cuts of the plate parts were made properly. However, it was his evidence that the saw cuts were not being made properly in January and February of 1980 with the result that it took considerably longer to fit the parts together, particularly the many parts which had to be fitted in order to make each octagonal plate. At this meeting, Haddy accused the grievor of spending too much time talking to other employees. The grievor denied this. The grievor testified that he was not talking any more than any other employee. It was not disputed that the grievor had some unavoidable periods of idleness while he waited for another employee to assist him in lifting and turning the plates, each of which had to be turned three times while being made by the grievor. Haddy told the grievor that if he did not substantially increase his production, his employment would be terminated.

8. During the first week of February, the grievor continued to be actively engaged in the complainant's organizing campaign.

9. For the past one and one half years, the employees in each of the areas of the plant have elected representatives to a plant committee which meets with management each month. At the January meeting, the members of the plant committee requested that management call a meeting of all employees. Haddy testified that the respondent has such a meeting during working hours about once a year, although this was the first time such a meeting had been requested by the plant committee. At this meeting Haddy addressed the employees and explained the respondent's poor financial position caused by high costs including the high cost of lumber. The grievor's testimony concerning this meeting was: "I would assume he was talking about these things because it was time to give us a raise again. Raises come the first of March. He was trying to tell us that he was losing money and couldn't give us any more." No mention was made of unionization at that meeting. On his production sheet for that week, the grievor made the following entry concerning that meeting: "office 1/2 hr. sob story."

10. Haddy testified that he decided to discharge the grievor on Friday, February 8, 1980, for three reasons:

- (a) the grievor's rate of production which in Haddy's view had been unsatisfactory in the four week period prior to February 1, 1980, had decreased in the first week of February after the grievor had been warned that he would be discharged unless his productivity increased;
- (b) Haddy did not like "the attitudinal comment about a 'sob story' on the production sheet"; and
- (c) Haddy had "learned that morning that in January, when spoken to by Quantz, [the grievor] had put on his coat to leave", which in Haddy's opinion "certainly indicated a bad attitude".

The grievor was called in to meet with Haddy at about 11:40 that morning and was told in the presence of Quantz that he was being discharged for those three reasons. When asked if he had anything to say, the grievor twice attempted to explain about the coat incident but was cut off each time by Quantz. The grievor testified that he "didn't try again because there was no use".

11. Section 79(4a) of the Act provides:

"On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

Accordingly, in this case the burden of proof is on the respondent to establish on the balance of probabilities that it did not act contrary to the Act.

12. In the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 745, the Board stated:

“... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred”.

13. As submitted by counsel for the respondent, it is not the function of the Board in the present case to decide whether or not the respondent had just cause to discharge the grievor. Our jurisdiction is limited to determining whether the respondent discharged the grievor because he was a member of the complainant union or was exercising any other rights under the Act (see *Toronto Star Limited*, [1971] OLRB Rep. Sept. 582, paragraph 11). This does not, however, preclude the Board from considering the context surrounding the respondent's action, as indicated by the Board in *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665, at paragraph 19:

“The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* – a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.”

14. The nature of the determination to be made in cases such as the instant case and the factors to be considered by the Board in making such determination are described as follows in *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 29, at paragraph 5:

“In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other ‘peculiarities’. (See *National Automatic Vending Co. Ltd.* 63 CLLC ¶16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without anti union motivation, the Board must find that the employer has violated the Act. These determinations, however,

are most difficult and require an incisive examination of all the evidence. Not only must the Board 'see through' the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if the Labour Relations Act has been violated."

15. After carefully reviewing all the evidence before it, the Board has concluded that the respondent has not proved on the balance of probabilities that it did not act contrary to the Act in discharging the grievor. Although no pattern anti-union activity has been established, the extent of the grievor's involvement in union activity, the manner in which the grievor was discharged and the lack of credibility of the management witnesses are relevant to and support our determination that the respondent has failed to prove on the balance of probabilities that there was no anti-union motive for the discharge (see *De Vilbiss (Canada) Limited*, [1975] OLRB Rep. Sept. 678.

16. Although the respondent may have had some concerns about the grievor's level of productivity prior to the time when he began to support the complainant, management neither imposed nor threatened any disciplinary action against the grievor until after the grievor had taken active steps to unionize the respondent. Although Haddy conceded in cross-examination that production sheets for the grievor were available from September of 1979 to the date of his discharge, Haddy brought with him to the hearing only those sheets covering the grievor's production from the period from January 4, 1980 to February 7, 1980. Thus, no meaningful comparisons could be made with the grievor's previous productivity or with the productivity of other employees. Such information would be very relevant since it would indicate what management had found to be an acceptable level of productivity at a time when there was no suggestion of any union activity on the part of the grievor. The satisfaction of the respondent with the grievor's performance prior to January of 1980 is evident not only from the fact that it continued to employ him at one of the highest wage levels in the plant, but also from the fact that in mid-December, in response to a question about the grievor's relatively high wage rate, Haddy told Dennis Amyotte (a witness who was employee of the respondent at that time): "Roy [Rabe] is a good worker. He makes good plates. His production is good. I am paying Rabe what he is worth." Although he was present on the day of the continuation of the hearing on which this testimony was given by Amyotte, Haddy was not called as a reply witness to refute these statements attributed to him. Accordingly, the Board accepts and relies upon them. While the grievor testified that he had reached the productivity level of about ten plates per day in December, the respondent did not refute his evidence that his apparently lower productivity level in January and the first week of February was caused by having to fit poorly cut plate parts and having to spend a significant amount of his time training new employees

to make plates. Although it was contended on behalf of the respondent that training of employees was a responsibility of Bill Williamson, not the grievor, Williamson was not called as a witness. Thus, the grievor's testimony that he spent many hours in January and the first week of February training two other employees to build plates was not refuted, nor was his testimony that in the last week of January, Williamson instructed him to train a new employee named Register and left the training of Register entirely in the grievor's hands. Accordingly, the Board accepts the grievor's evidence that his productivity during the first week of February was adversely affected by the significant amount of time which he devoted to training and assisting Register with the consent or acquiescence of management.

17. The efficiency calculations made by Haddy for the period from January 4, to February 7, 1980, are also problematic in that they are quite obscure. They are also peculiar in the sense that no such calculations were made concerning the productivity of other employees despite the assertion by management witnesses that there were other employees whose productivity was unsatisfactory. Moreover, Haddy was the only witness who appeared to have any understanding whatsoever of these calculations and even he exhibited some confusion and reservations concerning them. Furthermore, the calculations did not take into account the time spent by the grievor training other employees.

18. The evidence adduced on behalf of the respondent concerning when the decision was made to discharge the grievor was also unsatisfactory. Haddy testified that he made the decision on the morning of February 8, 1980, after he calculated the grievor's efficiency for the period from January 31 to February 7, 1980. However, Watts, who was excluded from the hearing room during Haddy's testimony, testified that he did not think the grievor was "on trial" during his last week of employment and further testified: "We wanted to get somebody to replace Rabe. We had already made the decision to do this." Haddy also testified that he "had learned that morning [February 8, 1980] that in January, when spoken to by Quantz, [the grievor] put on his coat to leave. . .". Quantz, on the other hand, who was also excluded from the hearing room during Haddy's testimony, testified that he told Haddy about the incident of the coat during the week of January 7, 1980. When confronted during cross-examination with this inconsistency, Quantz first said: "Maybe Haddy didn't hear me. It's noisy in the plant." He then stated: "I can't be sure whether I told Haddy in January or not." The Board finds that Haddy was informed of the coat incident during January of 1980.

19. Management witnesses also testified that the grievor was discharged because he was "holding up production". However, the evidence establishes that during the first week of February 1980, there were forty-five to fifty-five plates stockpiled. John Broome, an employee of the respondent who had built plates for the respondent before the grievor was hired, was subpoenaed as a witness by the complainant. The Board found him to be a very candid and truthful witness. After testifying concerning the stockpile of plates during the first week of February, he said: "To the best of my knowledge, Rabe never held up production by his work on plates. We run into supply problems sometimes. That all starts in the mill [where the parts for the plates are made]. Rabe was doing his work. He wasn't walking around talking to people." It is noteworthy that Broome's evidence was confirmed to some extent by the testimony of Watts who, in attempting to explain why the grievor was assigned to spend the majority of his time during his final week of employment performing tasks other than building plates, stated: "I assigned Rabe to build bodies that week. We were short of parts for plates." Thus, rather than being given a fair opportunity to improve his plate building productivity during his final week of employment, the grievor was assigned to spend much of his time doing

other tasks. The time which he was permitted to devote to building plates was further diminished by the training of Rogister as mentioned earlier in this decision.

20. Members of management gave disparate explanations concerning why the grievor was discharged rather than being transferred to another job as had occurred in the case of several other employees who had proved to be unsatisfactory as plate builders. Haddy's evidence on this point was: "We have normally given people a chance in another area but this wasn't done in this case because Rabe was receiving a higher rate." Quantz on the other hand, gave the following reason: "He was hired to make [plates]; that was the opening." Quantz also suggested that the grievor had previously been tried on other jobs, but the weight of the evidence is to the contrary. Under further cross-examination, Quantz stated that he did not know why the grievor was not transferred. This failure to transfer the grievor, whose work was acknowledged by management to be of good quality, is a further peculiar circumstance which supports an inference that the grievor was discharged contrary to the Act.

21. The evidence given by members of management was also inconsistent concerning the productivity of Rogister, the grievor's replacement. Quantz testified that neither Rogister's production nor his attitude was satisfactory. Watts, on the other hand, stated: "Rogister is making more than Rabe used to." When confronted in cross-examination with the disparity between his testimony and that of Quantz, Watts stated: "Rogister's keeping up. Rogister's not that hot. Rogister's no better or no worse than [the grievor] was." No documentary evidence concerning Rogister's productivity prior or subsequent to the discharge of the grievor was adduced by the respondent.

22. As noted by the Board in many previous cases, including *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. April 269, at paragraph 31, "[a]nti-union sentiment is seldom admitted by an employer as being the cause of discharge. The Board is therefore often required to draw conclusions in that regard on the basis of inferences having regard to all the evidence before it." Thus, although there was no direct evidence of management knowledge of the grievor's union activities prior to his discharge, the Board infers from all the circumstances that the respondent did have such knowledge. Haddy testified that he "heard again sometime in January" that "a union organizational campaign was on." Under cross-examination he stated that he received this information from Carleen Quantz, a secretary employed in the office of the respondent, who had "heard a rumor downtown" that "the union was around again". Haddy also testified that "on Friday afternoon [February 8, 1980] after we let [the grievor] go, his name was brought up as one of the organizers". Under cross-examination, he became rather evasive but ultimately revealed that the grievor was mentioned as one of the union organizers by Watts or Carleen Quantz during the afternoon of February 8, 1980. Watts, however, testified that he did not discover that the grievor had been involved in union activity until Monday, February 11, 1980 and testified that he told Haddy about it then. Carleen Quantz was not called as a witness. The Board also infers from the failure of the respondent to call Carleen Quantz, who apparently served as a conduit for information concerning union activity, that her evidence would have been unfavourable to the respondent's case or at least would not have supported it (see *B & S Furniture Manufacturing Limited*, Board File Nos. 2331-79-U and 2332-79-U, dated May 9, 1980, as yet unreported, and the authorities cited in paragraph 11 thereof).

23. There was also some direct evidence of anti-union sentiment on the part of management. Quantz, while testifying in chief concerning the aforementioned coat incident, stated:

"If I'd known that [the grievor] was a union organizer, I don't think that I would have let him come back in when he put his coat on. I wouldn't have let him change his mind about quitting." Under cross-examination, Quantz was extremely evasive when questioned about why knowledge of union organizational activities on the part of the grievor would have influenced his decision to permit Rabe to return to work after he put on his coat to leave. Moreover, the very fact that the grievor was encouraged to return to work after this incident during which the grievor spoke quite insubordinately to Quantz suggests that although somewhat dissatisfied with the grievor's productivity, management was not sufficiently dissatisfied with it to request or accept the termination of his employment at a point in time immediately before he began to engage in activity in support of the complainant. It was only after the grievor became a leading union organizer that the termination of the grievor's employment was considered and effectuated.

24. The Board therefore orders,

- (i) that Roy Norman Rabe be reinstated by the respondent forthwith;
- (ii) that Roy Norman Rabe be fully compensated by the respondent for all lost wages and benefits sustained through the respondent's violation of the Act;
- (iii) that the respondent pay interest on the compensation for lost wages ordered by the Board, such interest to be calculated in the manner described in *Hallowell House Limited* [1980] OLRB Rep. Jan. 35; and
- (iv) that the respondent post copies of the attached notice marked "Appendix", after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

DECISION OF BOARD MEMBER F. W. MURRAY:

Mr. Murray's decision will be given at a later date.

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE UNION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY DISCHARGING ROY NORMAN RABE.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT DISCHARGE ANY EMPLOYEE BECAUSE HE HAS SELECTED THE INTERNATIONAL WOODWORKERS OF AMERICA AS HIS EXCLUSIVE BARGAINING REPRESENTATIVE.

WE WILL OFFER TO REINSTATE ROY NORMAN RABE.

WE WILL PAY ROY NORMAN RABE FOR ANY EARNINGS THAT HE LOST AS A RESULT OF HIS DISCHARGE, PLUS INTEREST.

MOUNT FOREST CASKETS LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

DATED: JUNE 3, 1980

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0534-79-M The Toronto Building and Construction Trades Council and International Union of Bricklayers and Allied Craftsmen, Local 2, Applicants, v. **Napev Construction Limited**, Respondent, v. Masonry Contractors' Association of Toronto, Intervener #1, v. Venice Masonry Contractors (Toronto) Limited & Co., Intervener #2, v. Bricklayers, Masons Independent Union of Canada, Local 1, Intervener #3.

Collective Agreement – Evidence – Whether earlier finding of existence of collective agreement res jurdicate – Whether employer may challenge validity of agreement

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *A. M. Minsky and M. Zisler for the applicants; F. R. von Veh, S. J. McCormack, Kathleen Ward and Peter Shishkov for the respondent; Howard W. Isenberg for interveners #1 and #2; no one appearing for intervenor #3.*

DECISION OF THE BOARD; June 10, 1980

1. This is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*. It should be noted that International Union of Bricklayers and Allied Craftsmen, Local 2 ("Local 2") was, prior to a change in the name of its parent International, known as Bricklayers, Stonemasons and Tilesetters, Local 2, and is so referred to in an except from a prior Board decision set out below.
2. It is the contention of the applicants that Napev Construction Limited ("Napev") is bound by the terms of the provincial agreement between the International Union of Bricklayers and Allied Craftsmen and its Ontario Provincial Conference on the one hand, and the Masonry Industry Employers Council of Ontario on the other, ("the bricklayers' provincial agreement"). Napev denies that it is bound by the terms of this agreement.
3. The applicants contend that on March 14, 1974 Napev entered into a "working agreement" with The Toronto Building and Construction Trades Council, and that by the terms of this agreement Local 2, an affiliate of the Council, acquired bargaining rights with respect to bricklayers employed by Napev. It is not disputed that if Local 2 does hold such bargaining rights, then by virtue of the province-wide bargaining provisions of the Act, enacted in 1977, Napev would be bound by the terms of the bricklayers' provincial agreement in the industrial, commercial and institutional sector of the construction industry. The applicants and Napev are in agreement that the project giving rise to the grievance is in the industrial, commercial and institutional sector. For its part, Napev does not deny entering into the working agreement with The Toronto Building and Construction Trades Council, but it takes the position that the document could not serve to create any bargaining rights with respect to bricklayers. Napev contends that if given an opportunity to do so, it will be able to lead evidence to substantiate this position.
4. The applicants contend that it is too late for Napev to challenge the effect of the working agreement, since that matter is now *res judicata*. It was agreed at the hearing that

before dealing with any other matters relevant to the grievance, the Board would rule on the applicants' contention that the principle of *res judicata* bars any challenge by Napev in these proceedings concerning the effect of the working agreement.

5. In a decision dated September 17, 1979, the Board concluded that none of the interveners had status as a party to participate in these proceedings. However, being mindful of the importance and possible implications of its decision on this issue, the Board did accede to the request of counsel for interveners #1 and #2 that he be permitted to address the Board in the nature of an *amicus curiae* with respect to this aspect of the proceedings.

6. The working agreement upon which the applicants rely states as follows:

“WORKING AGREEMENT

AGREEMENT dated the 14th day of March A.D. 1974

BETWEEN: NAPEV CONSTRUCTION LIMITED, Phone: 274-3445
298A Lakeshore Road West,
Suite 201, Port Credit. L5H 1G6

hereinafter referred to as ‘The Company’

– and –

THE TORONTO BUILDING AND CONSTRUCTION
TRADES COUNCIL

hereinafter referred to as ‘The Council’

The parties hereto hereby expressly covenant and agree as follows:

PURPOSE

1. The general purpose of this agreement is to establish mutually satisfactory relations between the Company and its employees; to eliminate unfair practices; to establish and maintain satisfactory working conditions, hours of work and wages and to stabilize and encourage the construction industry.

RECOGNITION

2. The Company recognizes the Council and its affiliated unions as the collective bargaining agency for all its employees.
3. The Company agrees that it will employ only members of the unions affiliated with the Council and will let contracts or sub-contracts only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and will do

all things necessary to insure that only members of the unions affiliated with the Council are employed in construction work in which the Company is engaged.

4. The Council through its affiliated unions will supply competent workmen to do the work of any trade or calling that may be required by the Company in the trades represented by the Council.

WAGES, HOURS AND WORKING CONDITIONS

5. The Company agrees to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Construction Association and specifically agrees that if the provisions relating to wages, hours and working conditions set forth in the said agreements shall be binding on the Company. In the event any of the said conditions of any of the said agreements are altered or amended at any time during the currency of this agreement, the Company shall be bound by such alterations and amendments. The said agreements are available for inspection by the Company at the office of the Council at * at the Toronto Construction Association, 92 Yorville Avenue, Toronto; and at the Department of Labour, Parliament Buildings, Toronto. The Council shall notify the Company of any amendments or alterations of the said agreements.

*15 Gervais Drive, Suite 402, Don Mills.
M3C 1Y8

TERMINATION

6. This agreement shall remain in force for a period of one year from the date hereof and shall continue in force from year to year thereafter unless in any year not less than sixty days before the date of its termination, either party shall furnish the other with notice of termination of, or proposed revision of, this agreement; PROVIDED, however, that this agreement shall remain in full force and effect until completion of all jobs that have been commenced during the operation of this agreement.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their duly authorized representatives.

Signed on behalf of the Company Signed on behalf of Council

'P. Shishkov'
P. Shishkov

'C. A. Ballentine'
C. A. Ballentine - Business
Manager

'James D. Johnson'
James D. Johnson - Business
Representative"

7. The effect of this very same working agreement was litigated before the Board in File No. 0945-75-M. In that proceeding, The Toronto Building and Construction Trades Council referred a grievance to the Board under section 112a against both Napev and Vepan Leaseholds Limited and also requested that the Board apply section 1(4) and treat the two companies as constituting one employer for the purposes of the Act. In an unreported decision dated October 7, 1975, the Board, after reviewing the provisions of both section 112a and section 1(4), went on to make the following findings:

“4. The Board finds upon the evidence that the respondents carry on associated or related activities or businesses under common control. The Board further finds that, in the circumstances of this case, the respondents, namely Napev Construction Limited and Vepan Leaseholds Limited, are to be treated, and the Board will treat them, as constituting one employer for the purposes of the Act.

5. The Board consequently finds that both respondents are bound by the terms of a collective agreement made between Napev Construction Limited and the applicant and its affiliated unions, dated the 14th day of March, 1974.”

In paragraph 6 of its decision, the Board quoted the full text of the grievance filed by The Toronto Building and Construction Trades Council. Included in the grievance was a claim that Napev and/or Vepan had failed or refused to let or subcontract “masonry work, including labour work related thereto” to “individuals or companies whose employees are members in good standing in the unions affiliated with the Council...as required by paragraph 3 of the collective agreement”. In paragraph 7 of its decision, the Board stated as follows:

“The Board finds upon the evidence that the respondents are in violation of the collective agreement, as alleged by the applicant in the grievance set out above.”

8. Subsequent to the release of the Board's decision of October 7, 1975, the Bricklayers, Masons, Independent Union of Canada, Local 1 (“Local 1”) wrote to the Board requesting that it be added as a party to the proceedings and also requesting that the Board reconsider its decision. In a subsequent decision dated March 19, 1976 (reported at [1976] OLRB Rep. Mar. 109), the Board denied Local 1's request to be added as a party and made the following comments concerning the proceedings:

“1. In its decision dated October 7, 1975, arising out of an application made under section 1(4) and section 112a of *The Labour Relations Act*, the Board decided to treat the respondents as constituting one employer for the purposes of the Act pursuant to the provisions of section 1(4). The Board further found that the respondents were therefore bound by the terms of a collective agreement dated March 14, 1974 made between the applicant and its affiliated unions, on the one hand, and Napev Construction Limited, on the other hand.

2. The grievance which was referred to the Board under section 112a of

the Act contained an allegation of a breach of section 3 of the collective agreement at a job site on Kerr Street in Oakville.

3. Section 3 of the collective agreement provides as follows:

'The Company agrees that it will employ only members of the unions affiliated with the Council and will let contracts or sub-contracts only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and will do all things necessary to insure that only members of the unions affiliated with the Council are employed in construction work in which the Company is engaged.'

4. The grievance was particularized so as to indicate the trade areas in which the breaches were alleged to have occurred. For the purpose of the issue presently before the Board, Item 1(e) of the violation is the only one relevant. That item refers to masonry work, including labour work relating thereto. The evidence indicated that the work involved was brick-laying. The applicant claimed this work was being done by persons other than members of Bricklayers, Stone Masons and Tilesetters, Local 2, affiliated with Bricklayers, Masons and Plasterers International Union of America, one of the unions affiliated with the Council.

5. The Board, in its decision of October 7, 1975, found that the respondents had breached the collective agreement as alleged by the applicant. The breach occurred as result of the use by the respondents of a subcontractor who did not employ members of the applicant union as bricklayers on the site."

9. Subsequent to the Board denying Local 1 status to participate as a party in the proceedings, Local 1 filed an application for judicial review with respect to both of the Board's decisions. The Divisional Court, which dismissed the application, summarized the background of the case in the following terms:

"Napev Construction Company Limited (hereafter 'Napev') on the 12th day of June, 1975 entered into a contract as general contractor with Ontario Housing Corporation for the construction of a senior citizens home on Kerr Street in Oakville. Napev had a collective bargaining agreement, dated March 14, 1974 with the Toronto Building and Construction Trades Council (hereafter 'the Council'). It was a term of that agreement that Napev would only employ members of unions affiliated with the Council and would subcontract only to companies whose employees are members of unions affiliated with the Council. On June 12, 1975, Napev entered into a subcontract with a company called Vepan Leaseholds Limited (hereafter 'Vepan'), whereby Vepan would supply Napev with labour, tools, equipment and material for the work at the Oakville senior citizens building. Vepan had never had a collective bargaining agreement with any union.

On June 12, 1975, Vepan entered into a further subcontract with Prime Construction Limited (hereafter 'Prime'), to perform the masonry work on the senior citizens home. Prime had a collective bargaining agreement dated July 15, 1974 with Local 1. On September 18, 1975, the Council applied to the Ontario Labour Relations Board pursuant to s. 1(4) and s. 112(a) of *The Labour Relations Act* for a declaration (a) that Napev and Vepan were one employer; (b) that Vepan was therefore bound by the collective bargaining agreement between Napev and Council. . .

On October 2, 1975, the Board held a hearing at which Vepan and Napev appeared in opposition, no other persons intervening. On October 7, 1975, the Board declared Napev and Vepan one employer for the purposes of the Act, and also declared that any subcontract of work by Nepav [sic] or Vepan to tradesmen who were not affiliated with the Council constituted a breach of the agreement. Local 1 was not a union affiliated with Council, and the effect of the Board's decision was to require Vepan to terminate the subcontract with Prime, which it did about October 10, 1975, and the employees who were members of Local 1 left the job site at Oakville. Vepan then entered into a new contract with a different subcontractor for the masonry work. The masonry work at the job was substantially completed by April 22, 1976, and all work on the project, with the exception of certain minor deficiencies was completed by February 25, 1977."

10. The working agreement between The Toronto Building and Construction Trades Council and Napev also came before the Board in a number of subsequent proceedings. The first of these was in File No. 1112-77-M, which involved the referral of a grievance to the Board by The Toronto Building and Construction Trades Council and its affiliate Labourers' International Union of North America, Local 506 ("Labourers' Local 506"). Both Napev and the General Contractors Section of the Toronto Construction Association were named as respondents to the proceedings. In an unreported decision dated December 28, 1977, the Board concluded that the working agreement signed by Napev on March 14, 1974 created bargaining rights between Napev and Labourers' Local 506, and that by virtue of the provisions of the Act relating to accredited employers' associations Napev was bound by the terms of the collective agreement between Labourers' Local 506 and the General Contractors Section of the Toronto Construction Association. File No. 2097-78-M involved a grievance referred to the Board by Labourers' Local 506 with Napev and the General Contractors Section of the Toronto Construction Association being named as respondents. In those proceedings, Napev again alleged that it was not bound to any collective agreement with Labourers' Local 506. In an unreported decision dated April 4, 1979, the Board followed its decision in File No. 1112-77-M and concluded that Labourers' Local 506 held bargaining rights with respect to certain construction labourers employed by Napev. The Board then went on to conclude that due to the provisions of the Act relating to provincial bargaining, Napev was bound to the relevant provincial agreement with respect to construction labourers employed in the industrial, commercial and institutional sector of the construction industry.

11. In File No. 2121-78-M, a grievance against Napev was referred to the Board by The Toronto Building and Construction Trades Council on behalf of three of its affiliates, namely,

the Carpenters' District Council of Toronto and Vicinity, International Union of Operating Engineers, Local 793 and Sheet Metal Workers International Association, Local Union No. 30. The Board made all three of these affiliated unions separate parties to the proceedings. In an unreported decision dated April 26, 1979, the Board, after reviewing the terms of the working agreement between Napev and The Toronto Building and Construction Trades Council, as well as the provincial bargaining provisions of the Act, stated as follows:

"10. The Board, on the basis of the foregoing facts find as follows:

- (a) *Napev, by signing the working agreement with the Council voluntarily recognized as bargaining agents for its employees, the District Council, Local 793, and Local 30 and any other trade union which, at the time of the agreement, was affiliated or later became affiliated with it.*
- (b) *As a result of those rights and within the geographic scope of such rights, Napev is bound by operation of section 134(2) of the Act to such provincial agreements as also bind affiliates of the Council which hold those bargaining rights.*
- (c) Napev's hiring of persons to perform carpentry work falling within the scope of provincial agreement to which Napev and the District Council are bound was, on the evidence, a violation of that agreement.
- (d) Napev's employment of a person to operate construction equipment, the operation of which falls within the scope of the provincial agreement to which Napev and Local 793 are bound, was, on the evidence, a violation of that agreement.
- (e) Napev used a sub-contractor to operate construction equipment, the operation of which falls within the scope of the aforesaid provincial agreement. The sub-contractor was not in a collective bargaining relationship with Local 793 and had not been agreed to by the Local and Napev. On the evidence, the use of that contractor was a violation of that agreement.
- (f) Napev's use of a sub-contractor which was not bound by the provincial agreement to which Local 30 is bound to lay the roof, was, on the evidence, a violation of that agreement.

11. Having regard to these findings, the Board directs as follows:

- (a) that Napev cease and desist from continuing to violate the provincial agreement to which it and the District Council, Local 793 and Local 30 are bound;
- (b) that Napev abide by the terms of the provincial agreements referred to in Item (a) above, all within the geographic scope of those bar-

gaining rights and as they apply to the industrial, commercial and institutional sector;

- (c) that, having regard for all the circumstances of this case, *Napev be bound by any other provincial agreements which bind other affiliates of the Council which have been voluntarily recognized as bargaining agents for Napev's employees by virtue of the working agreement with the Toronto Building and Construction Trades Council*, all within the geographic scope of those bargaining rights as they apply to the industrial, commercial and institutional sector;
- (d) *that Napev abide by the terms of the provincial agreements referred to in item (c) of paragraph 11 and by the terms of any subsequent renewal of the provincial agreements referred to in items (c) and (d) of paragraph 11 until such time as the bargaining rights by which Napev became bound to those agreements are terminated by the Board, and*
- (e) that Napev meet with the applicants as agreed in the hearing and endeavour to agree on the amount of compensation and damages owing to the applicants in their own right and in the right of their members.” [emphasis added]

12. Counsel for Napev referred the Board to an unreported decision of the Board dated January 15, 1980 in File No. 1179-79-R. This case involved an application for certification by Labourers’ International Union of North America, Local 183 (“Labourers’ Local 183”) to become the bargaining agent for construction labourers employed by Napev on residential construction. Labourers’ Local 183 is an affiliate of The Toronto Building and Construction Trades Council. Although the Board generally does not hold hearings into construction industry certification applications, on its own motion the Board listed the matter for hearing for the purpose of determining whether Labourers’ Local 183 already held the bargaining rights which it was seeking. Although at the hearing the Board invited the parties to do so, neither Labourers’ Local 183 nor Napev addressed argument or evidence on the subject of any outstanding bargaining rights between them. On this basis, the Board concluded that on the evidence before it, it was not prepared to find that the applicant already held bargaining rights for the employees involved and accordingly, the Board proceeded to certify the union.

13. As indicated earlier, the applicant contends that the issue of the effect of the working agreement is now *res judicata*. The principles of *res judicata* are designed to bar the re-litigation of the same issues by the same parties. The Board discussed the principles involved in the following excerpt from the *Arnold Markets Limited* case, 62 CLLC ¶16,221, pp. 991-992:

“This case again raises the question as to the evidentiary effect of a previous decision of the Board when relied on as proof of matters in issue in another proceeding before it. The common law courts deal with this question under the rules of *res judicata* or estoppel. These rules, of course, are designed to bar re-litigation of adjudicated issues on the basis that as a matter of public policy there should be an end to litigation and that a party should not be twice vexed for the same cause or again re-

quired to prove a matter already adjudicated in his favour. The general rule at common law is that an existing final judgment rendered upon the merits by a court of competent jurisdiction is binding upon and conclusive evidence for or against the parties and their privies in any subsequent actions involving any matters actually decided and which might have been litigated in respect of those matters in the first action. (See the authorities referred to in *Wright Assemblies Limited*, Board file 9661-61-U and *Phipson on Evidence*, 9th ed. pp. 427-444). The conclusiveness of the judgment includes not only the findings but also the grounds of the decision where these can be clearly discovered from the judgment itself (see (*Phipson ibid* p. 427)).

It seems obvious that as a general rule, once a fact or question has been put in issue and directly adjudicated upon in a proceeding before the Board, such adjudication should constitute a final determination of the matter between the same parties and conclusive evidence for or against them in any other proceeding before the Board which involves the same question or fact. It is our opinion that the Board ought, as a general rule, to apply a principle analogous to that of *res judicata* or estoppel with the result that it must accept an existing decision made by it on the merits as conclusive evidence for or against the parties or their privies in any subsequent proceeding brought before it by the same parties and involving the same questions or facts decided by it in the first decision (see *Halsbury's Laws of England*, 3rd ed. vol. 15, pp. 212, 213)."

14. Counsel for the applicants contends that the various Board decisions dealing with the status of the working agreement makes the status of that document *res judicata*. Counsel for Napev, on the other hand, submits that he should be given an opportunity to lead evidence to establish that the working agreement was not a collective agreement and, further, that it could not serve to create bargaining rights with respect to bricklayers in that on March 14, 1974, when the document was entered into, Napev did not have any bricklayers in its employ. In support of his contention that the Board should not apply the principles of *res judicata*, counsel for Napev made the following submissions:

- a) When the Board adjudicates a section 112a referral, as a threshold matter it must find that a collective agreement is in existence, and since that is a matter which goes to the Board's jurisdiction it cannot be *res judicata*.
- b) *Res judicata* cannot apply to a piece of legislation and, accordingly, cannot preclude the Board from inquiring into the existence of a collective agreement.
- c) The Board's decision in File No. 1179-79-R to certify Labourers' Local 183 indicated that the Board did not regard the working agreement as creating bargaining rights for affiliates of The Toronto Building and Construction Trades Council.
- d) The Toronto Building and Construction Trades Council does not

come before the Board with “clean hands” in that it never informed the Board of factors which would have led the Board not to rely on the working agreement as the source of bargaining rights.

- e) In a proceeding under section 112a, the Board acts as an arbitration board and arbitration boards to not apply the doctrine of *res judicata*.

15. In the instant case, because of the sections of the Act dealing with province-wide bargaining, the issue is not whether there exists a collective agreement between Napev and either of the applicants, but whether Local 2 holds bargaining rights with respect to bricklayers employed by the company. If it does so, then by force of law, Napev is bound by the terms of the bricklayers’ provincial agreement. Accordingly, the issue to be determined is whether Local 2 ever acquired such bargaining rights. Although such a finding is a necessary part of determining whether there is any merit to the grievance filed by the applicants, we do not accept the proposition that this necessarily rules out of the application of *res judicata*. Further, we are unable to accept the proposition that to do so would mean that the principles of *res judicata* were being applied to a piece of legislation. Indeed, the cases referred to by Napev’s counsel in support of his position on this point support only the proposition that parties cannot by their conduct be estopped from later relying on the express provisions of a statute, a proposition which is not being disputed in these proceedings.

16. We are satisfied that the decision of the Board in File No. 1179-79-R to certify Labourers’ Local 183 is not of any assistance in determining whether the principles of *res judicata* have any applicability in these proceedings. In that case the parties declined to take any position on the issue of whether Local 183 already held the bargaining rights it was seeking to be certified for, and accordingly, the Board was not called upon to make any ruling concerning the effect of the working agreement.

17. As indicated above, counsel for Napev contended that boards of arbitration do not apply the doctrine of *res judicata* and that accordingly, this Board should not do so in proceeding under section 112a. In fact, certain boards of arbitration have applied a principle analogous to *res judicata*. See: *Re Canadian Union of Public Employees, Local 207, and City of Sudbury*, 15 L.A.C. 403 (Reville). Further, even if we were to assume that boards of arbitration have generally declined to do so, nevertheless, we are satisfied that this Board in an appropriate case should be prepared to apply a principle analogous to *res judicata*. Unlike “private” boards of arbitration which are generally “ad hoc” in the sense of being established solely for the purpose of hearing and determining a single grievance, this Board has been constituted by the Legislature as a permanent tribunal. It seems to us only reasonable that the Board should be able to rely on its own previous decisions involving issues which have been litigated between the same parties, and that this should be just as true in proceedings under section 112a as in any other proceedings. Experience has taught us that many of the grievances referred to the Board under section 112a of the Act involve complex issues of fact and law which take much time to determine. When such issues have been litigated an unsuccessful party should not be permitted to re-litigate them all over again.

18. This then brings us to the issue of whether this is a proper case in which to apply *res judicata* and foreclose the respondent from contending that Local 2 does not possess bargaining rights with respect to Napev. In a number of earlier proceedings, the Board has held that

the terms of the working agreement served to create bargaining rights between Napev and union locals belonging to The Toronto Building and Construction Trades Council. In the very first Napev case in File No. 0945-75-M, the Board concluded that the document served to create such bargaining rights with respect to bricklayers. In other words, Napev is seeking to contest a matter that has already been determined by the Board. In our view, the company should not be permitted to do so, and that a doctrine analogous to *res judicata* should be applied to prevent the matter from now being relitigated.

19. In reaching this conclusion we have considered the contention of counsel for Napev that there are certain facts which, if placed before the Board, might cause the Board to conclude that bargaining rights do not exist with respect to bricklayers. We have also taken into account his claim that The Toronto and District Building Trades Council has not come before the Board with "clean hands" since it did not earlier inform the Board of these alleged facts. The difficulty with these contentions is that if Napev felt these alleged facts to be relevant, it could have sought to lead evidence with respect to them at the time of the initial proceedings in File No. 0945-75-M. Having chosen not to do so, it is not open for the company to seek to have the matter re-litigated on the basis of evidence which it could have advanced before. In this regard we would refer to and adopt the following statements of Wigram, V. C. in *Henderson v. Henderson*, 67 E.R. 313:

"...where a given matter becomes the subject of litigation, and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

20. Having regard to the above, we are of the view that it is not now open for the respondent to contend that the working agreement did not create bargaining rights for affiliates of The Toronto Building and Construction Trades Council or that it could not have had this effect with respect to bricklayers.

21. The Registrar is directed to re-list this matter for hearing for the purpose of hearing the evidence and the representations of the parties with respect to all outstanding matters relevant to the grievance referred to the Board.

0318-80-R International Beverage Dispensers' and Bartenders' Union, Local 280, Applicant, v. The New Gregory House Inc., Respondent.

Practice and Procedure—Sale of a Business—Adjournment granted on conditions—Whether Board ordering costs due to non-compliance with conditions—Successor taking over business—Predecessor in default of commercial agreement

BEFORE: R. D. Howe, Vice-Chairman, and Board Members E. C. Went and W. F. Rutherford.

APPEARANCES: *Beth Symes, Frank Cortese and John Doyle for the applicant; L. Spodek, Moishe Nahum and Wendy Wright for the respondent.*

DECISION OF THE BOARD; June 19, 1980

1. The names: "The New Gregory House, also known as The New Gregory, The Gregory Tavern, Ye Olde Gregory and New Gregory House, Inc." appearing in the style of cause of this application as the names of the respondent are amended to read: "The New Gregory House Inc."

2. This is an application under section 55 of *The Labour Relations Act*. The applicant contends that the respondent is the successor of 401755 Ontario Limited.

3. This matter was originally scheduled for hearing on June 4, 1980 before another panel of the Board but was adjourned at the request of a representative of the respondent. The decision of that panel of the Board (dated June 6, 1980) reads as follows:

"1. This is an application under section 55 of *The Labour Relations Act*.

2. The respondent appeared by representative at the hearing and requested an adjournment. The Board was advised that the principal of the respondent, Mr. Moishe Neuham, had been required to leave the country on an urgent business matter in Israel, and had arranged to be back for the Board hearing which he mistakenly believed to be June 6th. Upon learning in Israel that the hearing was June 4th, Mr. Neuham attempted to book a flight back, but was not expected to arrive before the evening of the hearing date.

3. The Board does not accept a simple error over a hearing date as grounds for an adjournment, but hereby confirms its oral ruling that in the circumstances of this case the matter be adjourned to 9:30 a.m. Tuesday, June 10, 1980, without costs. In view, however, of the absence of direct evidence of the reasons for Mr. Neuham's failure to attend on the original hearing date, this order is made without prejudice to the applicant's right to raise the issue of costs for this hearing before the panel to which this case is assigned on June 10th.

4. The Board further directs that both parties attend at the Board's

offices at 9:00 a.m. on June 10th for the purpose of discussing this application with a Labour Relations Officer to be designated by the Senior Labour Relations Officer of the Board.

5. The Board further directs that the respondent file its reply in writing with the Board at the earliest possible time, but not later than 9:00 a.m. on June 10th."

4. At the commencement of the hearing before the present panel of the Board on June 10, 1980, counsel for the applicant requested that the Board order the respondent to pay its costs for the June 4th hearing. This request was not based upon the absence of direct evidence of the reasons for the failure of Mr. Moishe Nahum (referred to in the decision of June 6, 1980 as "Mr. Neuham") to attend on the original hearing date. Counsel for the applicant accepted the veracity of the reasons given at that time for Nahum's absence. Moreover, those reasons were subsequently substantiated by the testimony of Nahum who, upon becoming aware that Miss Wendy Wright, the Manager of the respondent, had misinformed him concerning the date of the hearing, paid an extra \$375.00 in an attempt to obtain an airline ticket for a flight which would bring him to Toronto in time for the hearing. The basis for the requested award of costs was the failure of the respondent to comply with the direction set forth in paragraph 5 of the decision quoted above. The only explanation offered for the failure by the respondent to file a reply was that counsel for the respondent had not been retained concerning this application until 7:00 p.m. on June 9, 1980 and was unaware of the direction that a reply be filed. No explanation was provided by Nahum for his failure following his return to Canada from Israel on the evening of June 4, 1980, to arrange for a reply to be filed on behalf of the respondent in accordance with the aforementioned direction.

5. The Board's practice in relation to costs is summarized in *Repac Construction & Materials Limited*, [1976] OLRB Rep. Oct. 610, at paragraph 10:

"10. The request for costs also goes against the grain of this Board's previous practice. Previous decisions not only indicate that the Board has no general practice of awarding costs, but also raise the question of whether the Board has any procedural jurisdiction to make an order for costs. See *Dow Jones Ltd.*, [1970] OLRB Rep. June 382; *Joffre Lapointe & Sons Ltd.*, [1971] OLRB Rep. Sept. 621. On some occasions, however, the Board has made the payment of costs a condition for the granting of an adjournment. See *Metropolitan Toronto Apartment Builders' Association et al.*, [1979] OLRB Rep. Nov. 846; *R. T. Construction*, [1971] OLRB Rep. June 342. From these case, it can be seen that the Board has not attempted to exercise any general power to award costs. This approach might be attributed to the fact that the Board has not been given any express power to award costs. It should be noted, however, that the general procedural jurisdiction, conferred by both section 91(2) of *The Labour Relations Act* and section 23 of *The Statutory Powers Procedure Act*, may be wide enough to encompass the power to award costs. Jurisdictional uncertainty, therefore, is not a particularly compelling explanation of the Board's reluctance to award costs. In our opinion, there is a much better reason for adopting a general practice of not awarding costs.

The underlying purpose of *The Labour Relations Act*, as set out in its preamble, is to further harmonious relations between employers and employees through the collective bargaining process. The purpose is not well served by a procedure that usually requires the identification of a winner and a loser. The application of such a procedure, moreover, would be time-consuming, distracting the Board from its primary task of facilitating collective bargaining. The awarding of costs, therefore, should not be extended beyond the situation where a party is being compensated for the expenses that would result from an adjournment to convenience another party. To extend this procedure any further would introduce an unnecessarily punitive element into the Board's procedures."

The Board is of the view that it would not be appropriate in the circumstances of the present case to award costs against the respondent as a penalty for contravening the direction of the Board. The Act provides a specific procedure under which punitive action can be taken in appropriate cases against a party which contravenes such a direction; under section 85 of the Act, contravention of any direction made under the Act is an offence punishable by fine on summary conviction. If the applicant wishes to further pursue this matter, it is open to it to apply to the Board under section 90 of the Act for consent to institute prosecution of the respondent. (See *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751, paragraphs 39-41, for a discussion of criteria considered by the Board in the exercise of its discretion under section 90(1)).

6. Nahum is the President and sole owner of the respondent company. In 1974 Nahum arranged for the respondent to purchase the tavern which is the subject of this application and the building in which that business is operated at 17-19 Adelaide Street West, Toronto. In 1977 that building was sold by the respondent to a bank but the respondent continued to operate the tavern by leasing the tavern premises from the bank. The respondent and the applicant trade union subsequently entered into a collective agreement covering all full-time and part-time male and female employees employed in the beverage departments in the tavern as tapmen, bartenders, beverage waiters, bar boys and improvers, and any other new classifications relating to the serving of alcoholic beverages.

7. On November 27, 1978 the respondent entered into an agreement (hereinafter referred to as the "Agreement") with 401755 Ontario Limited and with Gerald Baxter, Frank Bryan and Sharon Caruso under which it was agreed that 401755 Ontario Limited would immediately assume the management of the tavern. Under the terms of the Agreement, 401755 Ontario Limited agreed, *inter alia*, to pay a specified sum to the respondent monthly "[d]uring the management period" and to pay specified sums on April 17, 1979 and December 13, 1979. Article 5 of the Agreement provides as follows:

"The parties agree that should [401755 Ontario Limited] be late in making the monthly payment to [The New Gregory House Inc.] may at his [sic] option terminate this agreement and resume his own management of the tavern."

401755 Ontario Limited also undertook "to abide by the terms of the union agreement which binds [the respondent] in its relations with its employees". The Agreement also contained

a provision by which Baxter, Bryan and Caruso personally guaranteed to the respondent the performance of the terms and conditions of the Agreement by 401755 Ontario Limited. The Agreement also gave 401755 Ontario Limited an option to purchase the goodwill and other assets (subject to certain immaterial exceptions) of the tavern on April 17, 1979.

8. After the Agreement was executed, Baxter and Bryan assumed control of the tavern. The applicant, through Mr. Frank Cortese (Secretary-Treasurer and Business Agent) and his assistant, engaged in collective bargaining with Baxter and Bryan which resulted in the signing of a new collective agreement in early May of 1979 for a term commencing on May 1, 1979 and continuing until April 30, 1980 and from year to year thereafter in the absence of notice to amend (Article 18). Although this collective agreement purported to be between the respondent and the applicant, it bears the corporate seal of 401755 Ontario Limited and is signed by Bryan. While it appears that it may also have been signed by Nahum, there is no evidence concerning the capacity, if any, in which he signed and counsel for the applicant stated that the applicant is not taking the position that Nahum was a signatory to that collective agreement.

9. Although the option to purchase was not exercised, it is common ground between the parties to this application that the respondent "sold" the tavern in 1978 to 401755 Ontario Limited and to Baxter and Bryan within the meaning of section 55 of *The Labour Relations Act*. Nahum testified: "I sold the business to the numbered company [401755 Ontario Limited] in October of 1978". Baxter and Bryan assumed total direction and control of the tavern and its employees as confirmed by the evidence of the employees who testified at the hearing and by the evidence of Cortese who stated: "As far we were concerned, Baxter was the owner. He and Frank Bryan were the men in charge. They told us that they had leased the place from Moishe [Nahum]."

10. After a series of substantial defaults by the other parties to the Agreement, the respondent resumed the management and operation of the tavern. It is not clear from the evidence exactly when this resumption of control occurred since there was a period of approximately one week in mid-April of 1980 during which Nahum, Baxter and Bryan were all present in the tavern. As a result, there was great confusion concerning who was in control of the tavern during that period. On Thursday, April 24, 1980, Nahum arranged for the locks on the tavern to be changed by a bailiff. He also collected the proceeds from the tavern's sales that day and deposited the funds on behalf of Baxter and Bryan. On the following day, Nahum, who had discovered that the employees were threatening to quit since they had not been remunerated for the previous two weeks, paid each of the employees their wages for the previous week by cheques drawn on the account of the respondent.

11. On Sunday, April 27, 1980, Nahum called a staff meeting at which he told the employees about the aforementioned substantial defaults, advised them that he was going to carry on the business, invited them to continue to work at the tavern and appointed Miss Wendy Wright as the new manager of the tavern.

12. Following this meeting, each of the employees continued to work at the tavern under the direction and control of Nahum and Wright. The tavern, which had remained open during its normal business hours throughout the period of transition of management and control, continued to operate in the same manner as it had previously operated. Thus, there is no suggestion that the character of the business was changed in any way. Furthermore, the

respondent continued to deduct union dues from the wages of the employees and to remit them to the applicant in accordance with the provisions of the collective agreement.

13. The recent Board decision in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, contains a detailed discussion of the history, purposes and application of section 55. At paragraph 19 of that decision, the Board stated:

“In the absense of a successor rights provision any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in a partnership, would all effect a change in ‘the employer’ even where the plant equipment, products and work force remain substantially the same. The employees might find themselves working at the same plant, at the same machine, under the same conditions, with the same supervision, doing exactly the same job as before, but as a result of a transfer (of which they may not even be aware) their collective bargaining rights and their collective agreement would disappear. Section 55 avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining *status quo* by transforming the institutional rights of the union and the individual rights of the employees, (both of which are grounded upon the statute) into a form of ‘vested interest’ which becomes rooted in the business entity, and like a charge on property, ‘runs with the business.’ In *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733 the Board described the effect of section 55 as follows:

“Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.”

The Board has always construed the term “sale” broadly in view of the collective bargaining purpose which the concept of successorship was designed to achieve. For example, in *Thorco Manufacturing* (1965), 65 CLLC ¶16,052, the Board observed:

“According to its strict signification, the term *sells* is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section [55], however, the word *sells* had been given a wide definition which includes *lease, transfers and any other manner of disposition* of the business or part thereof. In legal parlance the word *lease* generally denotes a specific kind of contract by which one party, called the lessor, for consideration in money or its equivalent, confers to another, called the *lessee*, the exclusive possession of

certain property for a period of time. The word *transfers*, however, is obviously a term of wide signification and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word *transfers* to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word *transfers*, it is our opinion that the generality of the words *any other manner of disposition* is not intended to be in any way limited by or interpreted *ejusdem generis* with the words *leases, or transfers*. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words and any other manner of disposition as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that *sells* includes *leases or transfers*.

It is rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act* R.S.O. 160 c. 191). Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction."

In determining whether there has been a "sale" of a business within the meaning of section 55, the Board takes into account the totality of the transaction and places little reliance on its outward legal form (see *Hughes Boat Works Incorporated*, [1977] OLRB Rep. Dec. 815; application for judicial review dismissed, (1979), 26 O.R. (2d) 420 (Div. Ct.)).

14. In the present case, the respondent, faced with a series of defaults by the other parties to the agreement, exercised its option to resume the management and control of the tavern under Article 5 of the Agreement. This resumption of operation and control of the tavern by the respondent is somewhat analogous to the entry into possession of the premises of a business by a mortgagee under the terms of a mortgage, a situation which has been held by the Board to constitute a sale of a business within the meaning of section 55 (see *Bancorp Capital Limited*, Board file 2080-79-R, dated March 17, 1980, as yet unreported). Having regard to all the evidence, the Board finds that the resumption of operation and control of the tavern by the respondent under Article 5 of the Agreement falls within the ambit of the phrase "any other manner of disposition" in section 55(1)(b) of the Act. Accordingly, we find and declare that a sale within the meaning of section 55 of the Act took place between the respondent, as successor employer, and the other parties to the agreement of November 27, 1978, as predecessor employer.

15. A sale cannot be considered to have taken place until the successor employer assumes actual control of the business (see *International Beverage Dispensers' and Bartenders Union, Local 280 and 389135 Ontario Limited, operating as the Drake Hotel* (De Marco-Grievance), an arbitration award dated September 5, 1979, not yet reported (Adams)). In the present case, the precise date of the sale is rather problematic because of the aforementioned period of dual management and control by the predecessor and successor. However, it is clear on the evidence that the respondent through Nahum had resumed exclusive control of the tavern by April 27, 1980 at the latest. Accordingly, the Board finds that the sale occurred on April 27, 1980 and the Board further finds and declares that as of April 27, 1980, the respondent was bound by the collective agreement referred to in paragraph 7 hereof, by virtue of section 55(2) of the Act.

0147-80-M Northwestern Health Unit, Employer, v. Ontario Nurses' Association, Trade Union.

Arbitration – Change in Working Conditions – Union seeking arbitration for renewal of collective agreement – Agreement providing mechanism for establishing board – Employer refusing to appoint nominee – Whether refusal violation of section 70 or collective agreement – Whether Board or arbitration board appropriate forum

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members D. B. Archer and J. D. Bell.

APPEARANCES: *Donald F. Hersey for the trade union; F. Bickford for the employer.*

DECISION OF THE BOARD; June 16, 1980

1. This is an application under section 96(1) of *The Labour Relations Act* in which the Minister seeks the opinion of the Board as to his authority to appoint a person to constitute a Board of Arbitration. The relevant provisions of the statute are as follows:

96.-(1) Where a request is made under section 15, subsection 4 of section 37 or subsection 1 of section 37a, the Minister may refer to the Board any question that arises that in his opinion relates to his authority to make an appointment under any such provision that is mentioned in the reference, and the Board shall report to the Minister its decision on the question.

37.-(4) Notwithstanding subsection 3, if there is failure to appoint an arbitrator or to constitute a board of arbitration under a collective agreement, the Minister upon the request of either party, may appoint the arbitrator or make such appointments as are necessary to constitute the board of arbitration, as the case may be, and any person so appointed by

the Minister shall be deemed to have been appointed in accordance with the collective agreement.

2. The parties are agreed on the facts. The parties were bound by a collective agreement which expired on December 31, 1978. Proper notice was given and the parties engaged in negotiations with a view to concluding a collective agreement. These negotiations were unsuccessful. On September 25, 1979 the union wrote to the employer requesting that it constitute an "interest arbitration board" to settle the terms of the next agreement, and advising the employer of its nominee to that Board. The union relies upon Article 20.03 of the previous agreement which, it argues, provides the foundation for this interest arbitration process. Article 20.03 provides:

"All negotiations for amendments or renewal of this agreement shall be in accordance with the terms of the Ontario Labour Relations Act, R.S.O. 1970, Chapter 232, and any amendments thereto, and the Hospital Labour Disputes Arbitration Act, R.S.O. 1970, Chapter 208, and any amendments thereto."

The union contends that the reference to the Hospital Labour Disputes Arbitration Act in Article 20.03 incorporated by reference all of the interest arbitration procedures set out in that Act and that the employer is bound by Article 20.03 to engage in a process of interest arbitration which will ultimately result in a new collective agreement. The employer contends that Article 20.03 has no such effect, and that it was not the intention of the parties to provide for interest arbitration of their *next* agreement. There is, therefore, a dispute between the parties concerning the interpretation of Article 20.03 which crystalized on or about September 25, 1979 when the respondent refused to appoint a nominee to a Board of Arbitration purportedly constituted pursuant to that Article.

3. On September 27, 1979 the Minister of Labour informed the parties that he did not consider it advisable to appoint a conciliation board. Fourteen days after the release of this "no board" report, the parties were in a position to engage in a legal strike or lock out (see section 63(2)(b) of the Act); and the statutory "freeze" of working conditions provided by section 70(1) of the Act, came to an end. On February 22, 1980 (following some correspondence with the employer and the Minister of Labour which is not here relevant) the union purported to "file a grievance" under the terms of the collective agreement, alleging a failure by the employer to comply with the provisions of Article 20.03.

4. In our view the only facts relevant to our determination are that the dispute concerning the interpretation of the agreement arose prior to the expiry of the section 70 freeze and that the union now seeks to have the employer's alleged breach of the freeze determined by a Board of Arbitration. The statutory provisions creating the freeze and prescribing the manner in which alleged breaches of the freeze can be remedied are as follows:

70.-(1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employ-

ment or any right, privilege or duty to the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

- (b) until the right of the trade union to represent the employees has been terminated

whichever occurs first.

(3) Where notice has been given under section 45 and no collective agreement is in operation, any difference between the parties as to whether or not subsection 1 of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 37 applies *mutatis mutandis* thereto.

5. In our view section 70(3) provides a complete answer to the employer's objection to the appointment of a person to constitute a Board of Arbitration. Section 70, subsection (1) preserves all of the terms and conditions of employment previously embodied in the collective agreement, including Article 20.03. An alleged breach of section 70 may be dealt with by this Board under section 79; or, alternatively the parties may have the matter dealt with by a board of arbitration pursuant to section 70(3). The union contends that on September 25 there was such a breach and seeks access to arbitration under section 70(3), which incorporates section 37(4) *mutatis mutandis*. Section 37(4) allows the Minister to appoint an individual to constitute a Board of Arbitration. We are satisfied, therefore, that the Minister does have jurisdiction to appoint a person to constitute such "rights" arbitration board.

6. We do not wish to leave this matter without emphasizing the narrow question which was put to the Board and which we have answered *vis*: whether the union is entitled to have a rights arbitrator rule on its interpretation of Article 20.03 (as preserved by section 70(1)). We express no opinion on the arbitrability of the union's grievance, the "reasonableness" of the union's interpretation of Article 20.03, the arbitrators' remedial authority, (if any), of the relationship between this process and the general scheme for interest dispute resolution set out in the Labour Relations Act. These questions pose considerable difficulty (see for example, *Grey Owen Sound Regional Health Unit* [1979] OLRB Rep. Aug. 751) and it is unnecessary on this section 96 reference to address any of them.

2472-79-R Canadian Union of Operating Engineers & General Workers, Applicant, v. **Ontario Hydro**, Respondent, v. Canadian Union of Public Employees, Local 1000, Ontario Hydro Employees' Union, Intervener.

Appropriateness – Certification – Practice and Procedure – Pre-Hearing Vote – Applicant seeking carve-out of larger pre-existing unit – Whether Board directing pre-hearing vote – Relevant criteria reviewed

BEFORE: George W. Adams, Chairman and Board Members W. Gibson and M. J. Fenwick.

APPEARANCES: *E. Rovet and M. Powell for the applicant; F. G. Hamilton, R. J. Belton, F. B. Cruickshanks and G. D. Simard for the respondent; and C. M. Mitchell, W. A. Vincer, D. W. Burrows and N. T. MacIntosh for the intervener.*

DECISION OF THE BOARD; June 23, 1980

1. This is an application for certification where the applicant has requested that a pre-hearing representation vote be taken among employees in such voting constituency as the Board determines. The proposed bargaining unit was described in the applicant's request in these terms:

"All employees of the Respondent employed at Pickering G.S., Bruce Heavy Water Plant, Bruce Services, Douglas Point G.S., Nuclear Power Demonstration G.S. and the Nuclear Training Centre. For greater particularity the Unit applied for is described in part "G" of a Collective Agreement between the Respondent and C.U.P.E., Local 1000 that is for the term April 1, 1979 to March 31, 1980. The exclusions contained therein apply to the instant unit for which this application is being made."

The application was filed with the Board on March 31, 1980 and by decision dated April 3, 1980 the Board appointed a labour relations officer:

- a) to confer with the parties as to the description and composition of an appropriate bargaining unit;
- b) to examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 8 of *The Labour Relations Act*;
- c) to confer with the parties as to the description and composition of the voting constituency, the list of employees as of the terminal date in this matter to be used for the purposes of any vote that may be directed by the Board, the form of the ballot, the date and hour for the taking of the vote, and the number and locations of the polling places;

- d) upon consent of the parties to investigate any other matter relating to the application; and
- e) to report to the Board.

2. Section 8 of *The Labour Relations Act*, under which pre-hearing votes are conducted, provides:

“(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection 2 shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection 2, the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection 2 has the same effect as a representation vote taken under subsection 2 of section 7.”

It is apparent from subsection 2 that the Board is exercising a discretion when it entertains a request for a pre-hearing vote in contrast to the Board's responsibility under section 7. Section 7 provides:

“(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause j of subsection 2 of section 92.

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit."

3. The pre-hearing vote meeting with the labour relations officer was held in May of 1980. The submissions of the parties at this meeting caused the Board to schedule a hearing at which the applicant was asked to show cause why the Board should grant the request for a pre-hearing vote. This hearing was held on May 30, 1980 and gives rise to the instant decision. The matters at issue are obviously important to the parties, but they also involved important questions for this Board about the purpose of the pre-hearing vote procedure provided by the Act and about the significance of earlier decisions involving the same employer (Ontario Hydro) and, in some instances, the same parties.

4. The applicant, by its application dated March 31, 1980, proposed a bargaining unit which it believed to be appropriate for collective bargaining and which it believed to embrace some 3800 employees. One of the complicating features of this case, indeed the principal problem, arises from the fact that all of the employees of Ontario Hydro the applicant might wish to represent are already part of a collective bargaining relationship between Hydro and the Canadian Union of Public Employees, Ontario Hydro Employees' Union, Local 1000 (hereinafter referred to as "CUPE Local 1000") involving, according to the employer's reply, approximately 16,000 employees. Thus, the instant application represents a timely attempt to carve a group of employees out of this larger collective bargaining relationship, the collective agreement between CUPE and Hydro having expired on March 31, 1980.

5. The applicant advised the Board that it is applying for certification as bargaining agent for all employees of the respondent who work at nuclear energy stations or those facilities directly related to nuclear energy production. Unfortunately, the identification of the specific individuals who would come within this general characterization of the applicant's proposed unit is not a simple matter when one has regard to Ontario Hydro's organization and existing collective bargaining relationship. Indeed, as the applicant has responded to questions and objections of both the respondent and the intervener, it has been encouraged to amend its proposed bargaining unit description at least three times (including the hearing before the Board).

6. Briefly, the position of Hydro is that the unit applied for by the applicant is inappropriate for collective bargaining and that the appropriate unit is the existing province-wide unit represented by CUPE Local 1000. CUPE Local 1000 agrees with the position of Hydro as to the inappropriateness of the province-wide unit. In this respect, the respondent and intervener take the position that on a displacement application the only voting constituency under section 8 can be that defined in the most recent collective agreement between the employer and incumbent trade union and in the instant case the applicant lacks the threshold membership support to trigger any entitlement for the Board to consider its request. Alternatively, the respondent and intervener take the position that the bargaining unit proposed by the applicant, a) is so fraught with difficulties when one attempts to ascertain the employees entitled to vote; b) is so unlikely to be found appropriate by the Board; and c) would result in

such a complex and disruptive representation vote, that the Board ought to exercise its discretion against directing a vote and dismiss the application. On the other hand, the applicant points to a number of earlier decisions of the Board involving Hydro which, it submits, indicate that something less than a province-wide unit might be found by the Board to be appropriate for collective bargaining. The applicant also points to the substantial membership support filed with the Board and argues that the mere size and complicated nature of a representation vote ought not to frustrate the interest of these employees in having this Board determine the appropriateness of the unit requested and ascertaining their wishes to be represented by the applicant.

7. In deciding whether a pre-hearing vote ought to be directed, it is necessary to review: a) whether the applicant is obligated to seek a province-wide voting constituency; b) if directed, the difficulties associated with the administration and subsequent reliability of a pre-hearing representation vote in relation to the voting constituency proposed by the applicant; and c) the likelihood that the bargaining unit proposed by the applicant would be found to be appropriate. All of these issues, however, are best discussed against a background of understanding with respect to Hydro organizations; its existing collective bargaining relationship with the intervener; and some of the earlier cases before this Board in which it has been involved. Fortunately, one of the Board's earlier decisions involving Hydro contains a summary of Hydro's organizations that requires a minimal amount of updating.

Hydro's Organization

8. In *Hydro-Electric Power Commission of Ontario*, [1973] OLRB Rep. May 231, at paragraphs 9 and 10, Hydro's operations were described in the following way:

“Hydro has divided its operations into seven regions. More particularly, there are the Niagara and Western Regions with their head offices at Hamilton, the Georgian Bay Region with its head office at Belleville, the North Eastern Region and the North Western Region with their head offices at Thunder Bay, and the Central Region with its head office at Toronto. The number of employees in each region varies from some 400 in the Georgian Bay Region to 1,500 in the Eastern Region for a total of about 7,000 employees in the seven regions. An additional 5,000 persons are employed at the head office complex in Toronto and vicinity for an approximate total of 12,000 employees.

Each region is divided into areas and there are sixty-five areas across the province in which there are a total of sixty-eight hydraulic generating stations, six fossil fired thermal generating stations, three nuclear fired thermal generating stations, some twelve gas turbine thermal generating units, one hundred and eighty transformer stations and seven hundred and twenty distributing stations. The Operations Head Office Division exercises functional control over all of the above facilities, although administrative control to some degree is decentralized.”

9. The Board was advised that today 6,000 employees are employed at the head office and approximately 16,000 employees are employed within the CUPE Local 1000 bargaining

unit. The total staff of Ontario Hydro is in the order of 27,000 employees. Maps were filed with the Board to display the precise boundaries of the seven regions in order to convey the breadth of Hydro's operations and, one would assume, of its existing collective bargaining relationship.

10. Some background was also provided to the Board in regard to Hydro's use of nuclear energy and the sites devoted to this power source. The above-cited decision, at paragraph 8, reports that in the 1960's Hydro entered into a program to produce electrical power using nuclear energy as a heating device. Today this program consists of a number of nuclear power plants. One is near Rolphton. Another is the nuclear generating station at Douglas Point. This station is one component of the Bruce Nuclear Power Development Complex located near Kincardine on Lake Huron. There is also the Bruce Heavy Water Plant at the Bruce complex and another nuclear generating station at Pickering just east of Toronto. A second major power component in the Bruce Nuclear Power Development Complex was completed in the 70's (the Bruce Generating Station) and three new facilities are currently under construction – one at the Bruce site, known as Bruce "B", one at Pickering, known as Pickering "B", and the other at Darlington. Photographs of the Pickering, Bruce, and Rolph-ton sites were introduced into evidence together with site plans for the Bruce and Pickering complexes. All employees who might be subject to radiation hazards in nuclear operations go through an extensive training program before being deployed to any of the nuclear generating stations. Training centre facilities are located at Rolph-ton, Pickering, Bruce and Mississauga. In addition, there are a substantial number of employees involved in Hydro's nuclear energy program who are employed at its Head Office in Toronto.

The Existing Collective Bargaining Relationship

11. Hydro's collective bargaining relationship was described at paragraph 12 of the Hydro decision, *supra*, and is worth reviewing in the instant case.

"Turning now to the development of Hydro's collective bargaining relationship, in the 1930's Hydro accorded voluntary recognition to an employees' association which represented all of Hydro's employees. CUPE Local 1000 subsequently in the 1950's superseded and acquired the bargaining rights of the employees' association and since that time CUPE Local 1000 and Hydro have been parties to a series of collective agreements. In the early 1950's, however, the International Union of Operating Engineers (hereinafter referred to as I.U.O.E.) made successful applications for certification to this Board for employees at the Head Office Heating and Air Conditioning Plant, the Hearn Generating Station at Toronto and the Keith Generating Station at Windsor. The C.U.O.E. was successful in displacing the I.U.O.E. at these facilities in 1959. CUPE Local 1000, however, acquired and has held the bargaining rights for all of the employees of Hydro employed in its other new facilities built during the 1950's and 1960's and into the 1970's including the Bruce Heavy Water Plant, by reason of the province wide scope of the recognition clause of its collective agreements with Hydro. We would mention here that in 1968 the C.U.O.E. made an unsuccessful application to the Board for certification as bargaining agent for the employees of Hydro at the Lakeview Generating Station at Mississauga. At present,

nearly 12,000 employees are covered by the current collective agreement between Hydro and CUPE Local 1000 and some 450 employees are covered by collective agreements between Hydro and the C.U.O.E.”

12. The collective agreement between Hydro and CUPE Local 1000 expiring March 31, 1980 was introduced into evidence. The recognition clause, Article 1, is material to this application. It provides:

“1.1 Ontario Hydro recognizes the Union as the sole bargaining agent for all regular and temporary employees*, including Technicians of the Construction Field Forces but excluding:

- (a) Employees now represented by other bargaining agents,
- (b) Employees assigned to full-time security work,
- (c) Employees, other than Technicians, in the Construction Field Forces of the Generation Projects Division and the Lines and Stations Construction Department of the Transmission Systems Division who were placed in the Pension and Insurance Plan after April 1, 1953.

1.2 *“Employees” are employees pursuant to the Labour Relations Act for Ontario R.S.O., 1970 Chapter 232, as amended, with the exception of those persons who are excluded by the following criteria:

CRITERIA TO DETERMINE JURISDICTIONAL STATUS

A. Automatic Exclusions

- 1. All positions rated MP4 and above in accordance with “PLAN A RATING SCALE”, dated June 1968.
- 2. All positions excluded by Article 1 – Recognition.
- 3. All positions in which the incumbent is engaged in, has access to or handles confidential security matters.
- 4. All employees to whom an excluded employee reports, whether organizationally or functionally.
- 5. All positions which carry 3rd Degree (or higher) Staff Responsibility in accordance with “PLAN A RATING SCALE”, dated June 1968.
- 6. All positions which carry 5th or 6th Degree External Contacts in accordance with “PLAN A RATING SCALE”, dated June 1968.

All professional engineers employed in a professional capacity including employees who are not professional engineers but are engaged in the same job classification.

B. Managerial Functions

1. Requirement to make effective recommendations* regarding any of the following:
 - 1.1 Organizational objectives such as manpower needs, work methods, organizational restructuring, Ontario Hydro Policy, budgets and investments.
 - 1.2 Hiring, suspension, discharge, promotion, demotion, discipline.
 - 1.3 A change in the status of an individual's employment in terms of wage rates, working hours or transfer to other positions or locations.
 2. The job requires assessing and/or replying to employee grievances in accordance with Article 2.
 3. The job requires accountability to higher authority for planning, scheduling and for directing the work performance of others.
 4. The job involves training, instructing and evaluating the development of managerial employees in management skills.
 5. The job carries the authority to interpret and administer the Collective Agreement and Management Guides.
 6. The job contains responsibility for the preparation or custody of personal confidential personnel information resulting from investigations into the conduct, character or capability of employees.
- * Effective recommendation means more than providing guidance and advice but does not necessarily include final authorization. It does, however, include responsibility and accountability for making such recommendations.

C. Confidential Matters – Positions in which the normal job responsibility involves the custody or use of confidential information pertaining to Labour Relations.

1. Participation in the preparation, negotiation or communication of Ontario Hydro's bargaining agenda.

2. The development and communication of information of a confidential nature on Ontario Hydro's behalf required by Ontario Hydro in the conduct of negotiations.
3. Participation in Management meetings where decisions affecting Labour Relations are made.
4. Representing Ontario Hydro in dealing with Labour Relations matters.
5. Responsibility for the preparation or custody of confidential information required by Ontario Hydro and pertaining to labour relations as above or for grievances and arbitrations.

Note: Any one factor (except for those under B 3.) under Managerial Functions or Confidential Matters will make a job eligible for exclusion.

- 1.3 When an employee is removed from normal duties to act in a vacated position or relieve for an incumbent or perform a temporary assignment, the following shall apply:
 - (a) When the length of time involved is known to be three months or less, the employee will retain his/her present jurisdictional status.
 - (b) When it is expected that the length of time will be longer than three months, the employee will be excluded or included at the commencement of his/her new responsibilities. However, in the event the period is actually less than three months: a) in exclusion cases, the Union will be reimbursed the dues which would have been paid; b) in inclusion cases, the Union will reimburse the employee the dues which have been paid.
 - (c) When the length of time is unknown, the employee will retain his/her present jurisdictional status up to the three month period. If the period extends beyond three months, the employee will then be either included or excluded.
- 1.4 In the event of a dispute as to whether an employee is eligible, the criteria identified in Article 1.2 above shall apply and, in the event of further disagreement, the matter shall be determined by a single external arbitrator, selected from a panel of three arbitrators acceptable to both the Union and Ontario Hydro.
- 1.5 All existing union and nonunion jobs as of September 24, 1972, shall retain their existing jurisdictional status.
- 1.6 After April 26, 1978, if an arbitrator rules that the factors which origin-

ally substantiated exclusion are no longer operative each sub job may be tested against the criteria set out in Article 1.2 above."

It is important to note that the exclusions contained in this article principally relate to job functions and not to job classifications with the result that the persons affected may not constitute a readily identifiable group. The respondent argues that this uncertainty will likely mean that the status to vote of a great number of individuals may be challenged on any pre-hearing vote. The respondent also questions whether the Board will accept the "grandfathering" of "union and nonunion" jobs provided for in clause 1.5 of Article 1.

13. The agreement is subdivided into seven parts – parts "A" through "G". These parts are headed:

- Part A – General Items
- Part B – Maintenance Trade Items
- Part C – Operators' Items
- Part D – Weekly – Salaried Items
- Part E – Construction Field Forces
- Part F – Thermal Generating Stations
- Part G – Nuclear Generating Stations Items

The maintenance trades would appear to work on transmission lines through-out the Province regardless of the kind of generating system. Accordingly, these people do work on the nuclear system sites described above in that transmission of electricity commences on site. The electrical operators are engaged in the control and distribution of power over the entire system. Obviously, Hydro's responsibilities call for a high degree of centralized control and co-ordination in order to dovetail its generating capacity with the overall needs of users. Weekly salaried employees are located at every Hydro location including the sites in question. The construction field forces include construction technicians who are employed in various technical capacities and who are located across the system where construction is being undertaken. Many, therefore, are employed on the sites in question. Parts "F" and "G" would appear to be confined to hourly rated employees employed at the two kinds of generating stations (i.e. in effect the production people). From reviewing all of these parts, it becomes apparent that the agreement does not represent the organizational divisions of Ontario Hydro and none of the various parts of the agreement embrace all the employees employed at any particular location in Hydro's operations.

The Earlier Decisions

14. In *Hydro-Electric Power Commission of Ontario* [1968] OLRB Rep. July 376 the applicant requested a pre-hearing vote of the employees of the respondent in the following voting constituency:

"All employees of the respondent at its Lakeview generating station at Mississauga, save and except shift supervisors, foremen, persons above the ranks of shift supervisor and foreman, office staff and technicians."

The intervener in that case was, again, CUPE Local 1000. It objected to the taking of a pre-

hearing vote and requested an opportunity to make representations to the Board. The Board rejected both submissions and directed the taking of the vote. In so doing the Board wrote:

“One of the purposes of a pre-hearing representation vote is to permit the Board to ascertain the wishes of the employees without delay. If there are unresolved issues, these may be dealt with after the wishes of the employees have been recorded. The ballot box may then be sealed so that the other issues can be resolved on their own merits.

Where, as in this case, the voting constituency is identifiable with reasonable accuracy and there is little likelihood that a second representation vote will be necessitated, no one is prejudiced if the Board directs that a representation vote be taken and the ballot box be sealed. However, if the Board directed a hearing in order to resolve the issues raised by the other parties, prior to recording to support enjoyed by the applicant in a representation vote, and the Board subsequently determined that a representation vote should be held, the applicant’s position might be adversely affected by the delay. For these reasons, the Board is of opinion that the pre-hearing representation vote requested by the applicant should be held in this case and that the ballot box be sealed pending the determination by the Board with respect to the objections raised by the intervener.”

15. When the parties were unable to agree upon the description of the appropriate bargaining unit subsequent to the taking of the vote, this issue was dealt with by the Board in [1969] OLRB Rep. May 169. At the time the application was made, the employees at the Lakeview Generating Station were bargained for as part of an Ontario-wide bargaining unit represented by the intervener. The applicant, however, represented employees in a bargaining unit at the respondent’s Hearn Generating Station in Metropolitan Toronto and in a bargaining unit at the respondent’s Keith Generating Station in Windsor. Many of the employees employed at the Lakeview Station were trained at the Hearn station and were represented by the applicant during that period. In order to staff the Lakeview station, the respondent had transferred employees from bargaining units represented by the applicant and from other locations which were represented by the intervener. The Board reviewed all the evidence and concluded that, in and of itself, the carving out of one generating station was not inappropriate. The respondent had bargained on this basis with the applicant at other stations and, while having a concern for undue bargaining unit fragmentation, it was not the Board’s usual practice to find that an appropriate bargaining unit would be all employees in Ontario. Viewing the conflicting factors as a whole, that particular panel of the Board concluded that no overriding consideration was present and that the Board’s decision on the unit could take into account the wishes of the employees concerned. The Board therefore decided that it should ascertain the wishes of the employees as indicated in the pre-hearing vote in order to assist it, pursuant to section 6(1) of the Act, to make a determination as to whether the bargaining unit proposed by the applicant was a unit which would be appropriate for collective bargaining. The Board’s discussions of the bargaining unit issue is contained in paragraphs 5, 6 and 7.

“Having regard to all the evidence and the representations of the parties, the Board finds that there are many factors which would support the

applicant's position that the Lakeview employees form an appropriate bargaining unit which the applicant should be permitted to carve out of the unit presently represented by the intervener. The main factor in support of the applicant's position is that the applicant currently bargains on behalf of all employees of the respondent's Hearn and Keith Generating Stations, with certain exceptions not here relevant. The applicant obtained these bargaining rights when it was successful in displacing Local 796 and Local 844, respectively, of the International Union of Operating Engineers as bargaining agent for the employees of the Hearn and Keith Generating Stations. In 1952, the locals of the International Union of Operating Engineers were certified as bargaining agents for those generating stations following a representation vote between the respective local and the employee association of the Hydro Electric Power Commission of Ontario after the Board found certain employees at the generating stations to be an appropriate bargaining unit. The employee association of the Hydro-Electric Power Commission of Ontario was the predecessor of the intervener in this case and it represented an Ontario-wide bargaining unit which included employees at the Hearn and Keith Generating Stations at that time. The Board therefore, as early as 1952, established a practice of finding that the employees in a single generating station comprised an appropriate bargaining unit which could be severed from an Ontario-wide bargaining unit.

There are other factors that would militate against such a finding which would result in the partial fragmentation of the bargaining unit currently represented by the intervener. While the Board usually attempts to avoid the fragmentation of subsisting bargaining units, it is to be noted that it is not the Board's usual practice to find that an appropriate bargaining unit would be all employees in Ontario. Most certainly, any arguments against fragmentation of bargaining units are seriously weakened, if not destroyed, by the fact that the applicant currently bargains on behalf of employees at two generating stations which had been severed from an Ontario-wide bargaining unit. While these generating stations are much smaller than the Lakeview Generating Station, this fact does not destroy the principle of fragmentation which has been established. Although employees may be transferred on a permanent basis from time to time to staff new generating stations, it should be noted that there was not evidence of a day-to-day interchange of employees between generating stations.

Among other factors relied on by the respondent was the fact that the respondent is a public utility which provides an essential service and the Board was requested to give special consideration to this fact. As stated above, the fact that the respondent already bargains with more than one trade union with respect to employees who produce electrical power has not created insurmountable problems for the respondent. Since there is no evidence that the public interest has been unduly threatened or impaired by the fact that the respondent has dealt with more than one trade

union, we are of opinion that the wishes of the employees as to the choice of the trade union to represent them in an appropriate bargaining unit should be recognized.”

Reconsideration was refused by decision dated June 11, 1969 and reported at [1969] OLRB Rep. June 434. Subsequently, the vote was counted and the employees did not support the applicant. Accordingly, the application was dismissed.

16. In 1973 the Oil, Chemical and Atomic Workers, International Union (OCAW) applied as bargaining agent for all employees of the respondent at the Bruce Heavy Water Plant who were then represented by CUPE Local 1000 (See *Hydro-Electric Power Commission of Ontario*, [1973] OLRB Rep. May 231. It was the position of Hydro that the unit applied for was inappropriate and that the appropriate unit was the existing province-wide unit represented by CUPE Local 1000. CUPE Local 1000 agreed with this position. But, in the alternative, submitted that if a smaller unit was appropriate (which it did not admit), the unit would be the entire Bruce Nuclear Generating Complex at Douglas Point on Lake Huron. Such a unit was said to include not only the Heavy Water Plant, but also the adjacent Douglas Point Generating Station, the Auxiliary Steam Plant and the Bruce Generating Station which was then under construction. The decision contains an excellent summary of Hydro's facilities, some of which was reproduced above, and their operational inter-relationships. Highlights of the Board's findings include:

- management of each facility was responsible for its own budget although budget formulation was highly centralized
- in structure and organization the Hydro, throughout Ontario, was highly integrated, although a fairly wide latitude was accorded to the management of each facility;
- there existed a marked degree of functional coherence and inter-dependence within the Bruce complex itself;
- all of the chemical operators (a particular job classification under review) needed training to meet the standards required for a nuclear plant;
- transfers between the various nuclear generating stations and training centres were common;
- system-wide transfers of personnel were also common;
- there was a basic similarity in jobs throughout the nuclear system, but many job classifications and job functions were also the same as the classifications and jobs performed elsewhere in the Hydro system;
- there were basic common wage classifications, working conditions and benefits applicable to most employees represented by CUPE Local 1000.

17. In deciding that the earlier decisions to certify the I.U.O.E. for separate units covering the Hearn and Keith Generating Stations were of little weight, the Board wrote:

“While speaking of bargaining rights, the fact that the Board saw fit in the early 1950’s to certify the I.U.O.E. for separate units covering the Hearn and Keith Generating Stations which were carved out of the province-wide unit then represented by the Hydro employees’ association has little precedent value in the instant application. The reason for this is that at the time the Board certified the I.U.O.E. for the Hearn and Keith Generating Station, Hydro was just embarking on its post-war expansion program and the Hydro system throughout the province as we know it to-day did not exist at that time. Accordingly, the factors which we are called upon to consider in the instant application are quite different from those which the Board had to take into account in the early 1950’s when the Board found the two named generating stations to be appropriate units. In fact, we do not know what submissions were advanced with respect to the two earlier applications as no reasons for its decision were given by the Board in either application.”

18. Finally, the Board explained that because province-wide bargaining had resulted in a fairly stable relationship which had, by and large, benefited the interests of employees, the applicant had to provide “strong and compelling” reasons for carving out the unit it was seeking. And in this respect, the applicant failed. However, the applicant to-day places reliance on paragraph 29 of that decision, where the Board cautioned that it was not holding that a province-wide unit was the only appropriate unit. Specifically, the Board observed:

“We would state, however, that our decision should not be interpreted to mean that another unit either within the existing Hydro system presently represented by CUPE Local 1000 or even within the Bruce Nuclear Power Development Complex at Douglas Point or the Complex itself would not be an appropriate unit for collective bargaining. There may be factors or circumstances which would persuade the Board that some other unit or units of production employees of Hydro are appropriate for collective bargaining. Our decision relates solely to the unit sought by the applicant in the instant application.”

19. The next decision is *Hydro Electric Power Commission of Ontario*, [1973] OLRB Rep. Sept. 490 where the Canadian Union of Operating Engineers applied to be certified as bargaining agent for all employees of the respondent at the Nanticoke Generating Station, Nanticoke, save and except supervisors, foremen, persons above the rank of shift supervisors and foremen, office staff and technicians. While the applicant’s request for a pre-hearing vote was granted, its application was ultimately dismissed. In coming to this latter conclusion the Board reasoned:

“Having considered the evidence in this matter in light of the decisions above referred to, we find that in the interest of greater labour mobility and the preservation of the seniority rights of employees who are transferred from one site to another, that the larger bargaining unit represented by the intervener ought not to be disturbed. Finally, the history of

collective bargaining between the respondent and the intervener which covers in excess of twenty years wherein the intervener has represented employees of the respondent on a province-wide basis is a further reason for refusing to fragment the established bargaining unit. The fact that the applicant or its predecessor has represented the employees at the Keith and Hearn Generating Stations since 1951 does not detract from our findings in this matter. While there has been tremendous growth in the unit represented by the intervener, the unit represented by the applicant has not experienced similar growth. In making this observation we are not criticizing the respective quality of representations provided by either trade union. However, in the absence of evidence which would indicate that the intervener has failed to provide equal representation to employees at the various locations, we are not prepared to fragment the unit represented by it at this time."

20. The same applicant sought to be certified as the bargaining agent for all stationary engineers and persons primarily engaged as their helpers employed by the respondent at its auxiliary steam plant at Douglas Point, save and except the chief engineer (*Hydro Electric Commission of Ontario*, [1973] OLRB Rep. Nov. 563). Again, the Board granted the request for a pre-hearing vote, but ultimately dismissed the application. In deciding to dismiss the matter, the Board found there was a close interrelationship of facilities at the Bruce Heavy Water Plant Complex and the Auxiliary Steam Plant. Thus, the Auxiliary Steam Plant was not to be a separate and viable facility but rather was functionally dependent on services from elsewhere within the complex.

21. The last decision involves an attempt by CUPE Local 1000 to displace the applicant at the J. Clark Keith generating station in Windsor (See *Ontario Hydro* [1978] OLRB Rep. Aug. 754). In that case the Canadian Union of Operating Engineers & General Workers tried to rely on the Board's general practice to describe the bargaining unit in the same terms as the unit set forth in the most recent collective agreement with the incumbent union. The Board noted that the case did not call for any departure from the practice because the unit sought by the applicant did accord with the Board's understanding of the relevant bargaining unit under the most recent collective agreement.

22. It is against this background then that we must determine whether the pre-hearing vote requested by the applicant should be directed. The first issue is whether the province-wide unit described in the CUPE Local 1000 is the only appropriate unit and in support of this proposition the respondent and intervener directed our attention to a number of decisions including: *Roland Lefebvre Limited* [1966] OLRB Rep. May 140; *Toronto Star Limited* [1974] OLRB Rep. July 416; *Harding Carpets Limited* [1975] OLRB Rep. July 566 (where the applicant successfully intervened on the basis of the doctrine); *The Wellesley Hospital* [1976] OLRB Rep. Feb. 46; *The Canadian Red Cross Society Blood Transfusion Service* [1978] OLRB Rep. May 408. This principle is not to be lightly dismissed. Where parties have established the viability of a bargaining unit through actual bargaining and where the history of such bargaining has been relatively satisfactory, this Board ought not to encourage fragmentation. Moreover, in these cases, the Board is not dealing with employees who are unrepresented by a trade union. Thus, more concern can be given to the most viable unit from a collective bargaining viewpoint without the risk of impeding the initial organization of employees attempting to engage in bargaining. But the principle cannot be without its exceptions. Sec-

tion 48 of the Act clearly envisages displacement applications which are less extensive than pre-existing bargaining units. While there is a strong presumption in favour of the incumbent trade union's bargaining unit, the Board is willing to entertain evidence and submissions on why the status quo ought not to be maintained. The incumbent trade union may clearly have failed to represent a distinct and cohesive group adequately, a problem that has sometimes reared its head in the relationship of skilled and unskilled employees. This problem of unsatisfactory representation may be combined with a capacity in the employer to tolerate somewhat greater fragmentation, particularly if the smaller unit sought can meet the principles of appropriateness generally applied to certification cases. In the case at hand, the applicant indicated its intent to adduce evidence on the distinctive nature of Hydro's nuclear energy facilities; on the common training and conditions of employment of the affected employees; and on the manner in which they have been represented by CUPE Local 1000. The unit relied upon by the intervener and the employer is not one that the Board would normally grant and the intervener, itself, never had to organize all of the affected employees. Against this background, we are not prepared to say at this time that the applicant will be unable to make out a case justifying the unit it has requested. On the other hand, the applicant's chances for success based on its answers to the Board's probing and against the background of all that we have reviewed above, cannot be characterized as substantial.

23. If a province-wide bargaining unit is not *per se* the only appropriate unit, is the Board obligated to direct the requested pre-hearing vote? Section 8 gives the Board a discretion to exercise and, historically, this discretion has been exercised in light of the section's purpose.

24. The quotation from one of the earlier Hydro decisions found at paragraph 14 spells out this purpose and a recent statement in this respect is found in *Emery Industries Limited*, Board File No. 1860-79-R issued March 19, 1980, as yet unreported:

"5. It is axiomatic that in labour relations matters 'time is of the essence'; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute."

The pre-hearing representation vote therefore allows for a speedy assessment of the wishes of the employees. However, where the unit sought is clearly inappropriate or where the composi-

tion of the bargaining unit is so complex as to impede and undermine the taking of a meaningful representation vote, the Board has been unwilling to go through the motions of a pre-hearing vote. See *Howard Furnace Limited* [1961] OLRB Rep. July 98. In the instant case, the applicant is burdened by a combination of these latter factors. The applicant's suggested bargaining unit clearly cuts against the principle discussed in *Canadian Red Cross* and is not, at first blush, in tune with many of the principles usually applicable to bargaining unit determination cases. See *Usarco* [1967] OLRB Rep. Sept. 527. Similarly, counsel for the applicant did not give the Board the impression that it would be introducing unequivocal evidence of inadequate trade union representation by CUPE Local 1000. And, most importantly, the uncertainty surrounding the identification and appropriateness of the unit requested could attract so many proper challenges from the respondent and intervener as to make the vote exceedingly difficult to administer and endanger the reliability of the votes cast and subsequently counted. We note that since the outset of its application, the applicant itself has been amending the unit description as new information becomes available. And each time, the respondent has tried to accumulate the information needed to respond to the Board's forms. This is some evidence of the complexity the parties and the Board face. It is also conceivable that the applicant will want to challenge many of the employee exclusions contained in Article 1 of the agreement, a monolithic provision not based on specific job classifications. Similarly, the respondent may properly challenge the voting of the unit requested as one comprehensive group and ask for a segregation of ballots on a facility by facility basis. There is also concern for the relationship of the construction field forces, the head office employees and the other nuclear energy sites currently under construction (together with the employees in training for these sites) to the unit the applicant seeks to represent. None of this uncertainty and complexity was present in the other pre-hearing votes directed by this Board in the cases reviewed above involving Hydro. And with these problems comes the real risk that a second representation vote would have to be ordered after the Board finally determined the appropriate unit or units in order to assess the wishes of employees in a reliable way. With the proposed bargaining unit subject to substantial challenge, the votes of employees could well be dependent on the Board's view of the appropriate unit(s). For example, if the Board found that the appropriate unit should be on a facility by facility or complex by complex basis, employees may be less attracted to the applicant's representation. This approach could fragment the applicant's support and adversely affect an employee's perception of the applicant's eventual bargaining power. We have great concern over the reliability of ballots cast in the face of so much uncertainty over the very structure of collective bargaining by way of the applicant trade union.

25. The applicant's description of the bargaining unit proposed in its application of March 31, 1980 referred to "Part G" of the CUPE Local 1000 collective agreement and, thereby, seemed to be concerned with 3,191 production employees. Posting in the workplaces went up to this effect. They by letter dated April 15, 1980 it indicated that it also intended the bargaining unit to include clerical employees (all weekly or salaried employees at the various sites pertaining to nuclear energy) and control and chemical employees. This appears to have swept in another 651 persons after Hydro spent considerable time identifying the impact of this amendment. However, Hydro pointed out that this amendment still appeared to exclude employees at its head office concerned with the nuclear division and employees in training at Peterborough and Mississauga for the new sites. These people will be eventually transferred to Darlington and Bruce B but are not, at present, employed under "Part G" of the agreement. Subsequently, at the meeting with the Board's labour relations officer on May 1, 1980, the applicant advised the other parties that it wished to exclude the Bruce B and Darlington sites together with head office employees. But, by letter dated May 6, 1980, it advised the other

parties that it did wish to include all persons at Peterborough and Mississauga being trained for the new sites. As we have already observed, the pre-hearing vote procedure is designed to facilitate the certification process where the bargaining unit requested is relatively easy to ascertain and is clearly set out by the applicant. It is our opinion that an application as complex, as novel and as speculative as the instant application ought to have the appropriateness of the bargaining unit determined first and this is particularly the case where the affected employees are already participating in collective bargaining.

26. The Board was advised that the underlying concerns of the substantial number of employees who have apparently turned to the applicant are based upon a perception that CUPE Local 1000 favours the employees employed in the older divisions of Hydro. Employees in the nuclear energy division believe, the Board was told, that they have been unable to effect important changes to their status through the bargaining process and, given the structure of CUPE Local 1000, that this problem is likely to continue. Counsel for the intervener characterized these submissions as inaccurate and made the point that, in this round of bargaining, CUPE Local 1000 had to postpone consideration of many groups worthy of special consideration in favour of a general increase beneficial to all. We would make only two observations on both of these submissions. Contrary to the submissions of the intervener's counsel, the discontent underlying this application does not appear to arise solely from the most recent round of negotiations and should be reviewed by both the intervener and respondent in the interests of good industrial relations. Secondly, the submission of counsel to the applicant on the reasons for this discontent did not appear to reveal the kind of "strong and compelling" problem referred to by the Board in the 1973 *Hydro* case (see paragraph 18) that would justify the carving up of an established collective bargaining relationship. Of course, we did not hear evidence on this point and may well be mistaken in this impression. However, without clear evidence of inadequate representation, the applicant must understand this Board's interest in encouraging broader based collective bargaining structures which maximize opportunities and flexibility for both employers and employees. See E. E. Herman: *Determination of the Appropriate Bargaining Unit*: Queen's Printer, 1966, at 44-45. And in a displacement application the Board has a tendency to pursue this interest in a more single-minded manner than in the usual application for certification.

27. For all of these reasons the applicant's request for a pre-hearing vote is refused and the matter is referred to the Registrar under Rule 5 for the fixing of a new terminal date and the posting of appropriate forms.

2443-79-R Hotel and Club Employees' Union, Local 299, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L. C.I.O.-C.L.C.), Applicant, v. Skyline Hotels Limited, Respondent.

Certification – Pre-Hearing Vote – Practice and Procedure – Section 7a – Applicant filing pre-hearing vote application subsequent to several section 79 complaints – Withdrawing pre-hearing vote application and filing fresh certification application invoking section 7a – Whether permissible – Procedural and timeliness considerations reviewed

BEFORE: R. D. Howe, Vice-Chairman and Board Members D. B. Archer and F. W. Murray.

APPEARANCES: *Alick Ryder, Q.C. and Jean Guy Belanger for the applicant; G. Grossman, J. Andrews and M. Elsayed for the respondent.*

DECISION OF THE BOARD;

1. The name "Skyline Hotel" appearing in the style of cause of this application as the name of the respondent is amended to read: "Skyline Hotels Limited."
2. This is an application for certification.
3. During February of 1980, the applicant filed four complaints under section 79 of *The Labour Relations Act* concerning events including the discharge of a number of employees of the respondent, which allegedly occurred in early February (Board File No. 2099-79-U, filed on February 11, 1980; Board File Nos. 2139-79-U and 2140-79-U, filed on February 15, 1980; and Board File No. 2216-79-U, filed on February 27, 1980). The applicant then filed an application for certification in which it requested that a pre-hearing representation vote be taken (Board File No. 2229-79-R, filed on February 28, 1979). The hearing of the section 79 complaints commenced on March 12, 1980. On March 13, 1980, in accordance with the Board's normal practice, a Labour Relations Officer convened a pre-hearing vote meeting at which the lists of employees filed by the respondent and the applicant's challenges concerning these lists were discussed. Some of the challenges were resolved at that meeting but a number were not. Although the final count was not announced at that meeting, it appears that the information which was provided enabled the applicant to reassess its position. Counsel for the applicant stated that this information led the applicant to conclude that it was doubtful whether it would have the level of membership needed to entitle it to a pre-hearing vote in view of the unexpectedly large number of employees potentially included in the proposed bargaining unit, and in view of the number of employees who previously had been thought by the applicant to be full-time employees but who the applicant concluded might be treated by the Board as part-time employees.
4. The following letter dated March 25, 1980 was received by the Board on March 27, 1980 from counsel for the applicant:

"Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4

Attention: D.K. Aynsley
Registrar

Dear Sir:

Re: Hotel and Club Employees' Union, Local
299 and Skyline Hotel – Application for
Certification Board File No. 2229-79-R

We are the solicitors for the Applicant in this matter and in the series of complaints under Section 79 of the Act encompassed in Files Nos. 2099-79-U, 2139-79-U, 2140-79-U and 2216-79-U. In view of the circumstances set forth in the complaints, we are by this letter invoking the provisions of section 7(a) of the Act and withdrawing our application for a pre-hearing vote under Section 7 [sic] of the Act.

In the event the Board's procedural requirements may call for a fresh application in order to bring in the protection of Section 7(a) we have, in the alternative, enclosed a fresh Application for Certification in Form 1.

Will you please apply the membership evidence, including the declaration in Form 8, filed in the original application under your number 2229-79-R to this new application."

As a result of that letter, another panel of the Board issued the following decision dated March 31, 1980 concerning File No. 2229-79-R: "This application is withdrawn at the request of the applicant and with consent of the Board." As a further result of that letter, the present application was duly processed and set for hearing on April 25, 1980.

5. Paragraph 7 of Form 1 filed by the applicant in the present case contains the following statement: "In view of the circumstances set forth in Board Files Nos. 2099-79-U, 2139-79-U, 2140-79-U and 2216-79-U, it is respectfully submitted that the application of section 7a of the Act ought to be applied." In a letter delivered to the Board on March 31, 1980 and in oral argument at the hearing on April 25, 1980, counsel for the respondent contended that the applicant cannot ask the Board to invoke section 7a under the auspices of a new application for certification. Counsel stated that the respondent had no objection to the applicant withdrawing the first certification application and filing a new application, but submitted that the applicant was under an obligation to raise section 7a when it first became aware of the alleged improper conduct. After noting that all of the allegations upon which the applicant seeks to base its section 7a request were known to the applicant prior to the filing of the first application for certification (Board file No. 2229-79-R), counsel for the respondent argued that the applicant should have indicated in the first certification application that it intended to rely upon section 7a and further argued in the alternative that the applicant should have indicated

its intention to rely upon section 7a at the pre-hearing vote meeting on March 13, 1980 at the very latest. In support of his submissions, counsel cited several Board decisions which will be discussed later in this decision. It was also contended that the respondent has been prejudiced by the applicant's alleged failure to act promptly; counsel suggested that if the respondent had known that the applicant was seeking to rely upon section 7a, the respondent could have requested that the certification application be consolidated with the aforementioned section 79 complaints and that the applicant be required to proceed to call its evidence first in lieu of the normal practice of requiring the respondent to proceed first in cases to which section 79(4a) applies.

6. In response to the respondent's submissions, counsel submitted that the applicant was under no obligation to state in its first certification application that it intended to rely upon section 7a. He noted that the first application was an application for a pre-hearing vote, which would be inconsistent with an application under section 7a for certification without a vote. He asserted that in view of the difficulty of determining with any degree of certainty the size of the proposed bargaining unit (which he suggested might contain between 300 and 400 employees) and the difficulty of applying the Board's normal criteria for distinguishing between full-time employees and part-time employees to the respondent's operation, which he suggested uses different criteria to distinguish full-time and part-time employees, the applicant was unable to assess the legal significance of the respondent's alleged misconduct until after it had obtained the information which was provided at the pre-hearing vote meeting. He argued that all of the cases cited on behalf of the respondent are distinguishable on the basis that they are cases in which there was a delay in making the allegations of misconduct, which was not in his submission what occurred in the present case. In support of this position he noted that the respondent has not suggested that the allegations of misconduct contained in the aforementioned section 79 complaints were untimely. He also expressed the view that a union should not be obliged to state in a certification application that it intends to rely on section 7a if it is unaware at the time of the application that there is any need to invoke section 7a. He contended that to impose such a requirement would result in unions "tucking in section 7a" in certification applications out of an abundance of caution where they did not really intend to rely upon section 7a.

7. Section 7a of the Act provides:

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

Although this provision can only be applied by the Board "on the application of the trade union", nothing in this section requires that such "application" be included in or filed simultaneously with the first certification application made by a trade union after it becomes aware of the contravention(s) of the Act which may form the basis of a section 7a application.

8. Rule 47 is concerned with the prompt filing of notice of intention to allege improper or irregular conduct:

“47.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

(a) include in the application or complaint; or

(b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.”

However, the provisions of this Rule do not support the respondent's submissions because the Rule only requires the applicant to include in the application, or to file promptly a notice of intention which contains, a concise statement of the material facts, actions and omissions upon which it intends to rely in support of its allegations of improper or irregular conduct by the respondent; it does not require the applicant to promptly specify all of the remedies or consequential relief which may ultimately be requested by it in any future proceedings based upon such allegations.

9. It was not disputed that the applicant complied with Rule 47 with respect to the allegations contained in its four section 79 complaints referred to in paragraph 3 of this decision. Moreover, the applicant has complied with the requirements of Rule 47 in respect of the present application since it has included in paragraph 7 of that application the required “concise statement” by referring to “the circumstances set forth in Board Files Nos. 2099-79-U, 2139-79-U, 2140-79-U and 2216-79-U”.

10. After carefully reviewing the cases cited by counsel, the Board has concluded that those cases do not support the position advocated on behalf of the respondent. *Seaway Apparel Ltd.*, [1967] OLRB Rep. May 145; *General Crane Industries Limited*, [1975] OLRB Rep. Jan. 39; *H.D. Lee Company of Canada Limited*, [1975] OLRB Rep. Jan. 55; *King Optical Company*, [1968] OLRB Rep. Jan. 952; *Freeman Electric*, [1972] OLRB Rep. Sept. 822; *Gignac, Sutts, Nosanchuk*, [1973] OLRB Rep. Aug. 438; *Chatham Gardens (London) Inc.*,

[1977] OLRB Rep. Jan. 12; and *Cable Tech Wire Company Limited*, [1978] OLRB June 496, are cases cited on behalf of the respondent in which a party failed to comply with the requirement of giving prompt notice of allegations of misconduct. Those cases are readily distinguishable from the present case, in which it is not disputed that the allegations of misconduct on which the section 7a application is based (as set forth in the section 79 applications) were brought to the attention of the respondent in a timely manner.

11. A further case cited on behalf of the respondent was *Local 593 United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada*, [1977] OLRB Rep. June 353, a section 79 complaint in which the applicant requested an order directing the respondents to cease and desist from engaging in their alleged violation of section 61 of the Act. When the case was prolonged because the Board, due to its scheduling procedures, could not proceed with the second day of hearing because of the commitment of one of the members of the panel to another case, the complainant requested leave of the Board to amend its claim to add a claim for damages. This request was apparently made on the second day of the hearing. In denying the request, the Board stated at paragraph 9:

“...it was in the complainant’s discretion to request damages at the time it filed its complaint and it failed, for reasons never explained to the Board, to do so. This case was prolonged because the Board, through its scheduling procedures, could not proceed with the second day of hearing originally set aside because of the commitment of Board Member Archer to another case. The Board simply cannot accede to the complainant’s request to amend its claim for relief for reasons plainly attributable to the Board’s scheduling procedures. In other words, a party to our process cannot be penalized for delays occasioned by the Board, however inequitable that may appear to the party prejudiced.”

Counsel attempts to analogize the failure of the present applicant to include in its initial certification application a request for certification under section 7a to the failure by the complainant in the *Local 593* case to include a claim for damages in its section 79 complaint. However, that case is distinguishable on the ground that the amendment was requested after the hearing had commenced and was based upon a prolongation of the case which was not the responsibility of the other party. In the present case, the request that the Board apply section 7a was contained in the application itself and was, therefore, made well in advance of the hearing. A situation somewhat analogous to the *Local 593* case would be a situation in which an applicant for certification requested leave to amend its application on the second day of hearing of the case to include a claim for certification under section 7a. However, that is not what has occurred in the present case. Accordingly, the *Local 593* case does not assist us in deciding upon the validity of the respondent’s preliminary objection in the instant case.

12. A further case cited by counsel for the respondent, *E.B. Eddy Forest Products Ltd.*, [1978] OLRB Rep. Aug. 731, is also distinguishable from the instant case. In the *Eddy* case, a vote had been ordered in the original application for certification filed by the applicant and the application had been dismissed because not more than 50% of the ballots cast were in favour of the applicant. In that original certification application the applicant had requested certification under section 7a but then withdrew this request. Several months later, the applicant

applied under section 79 alleging a contravention of sections 3 and 56 of the Act and seeking as a remedy a new vote. In dismissing the section 79 application, the Board stated:

“20. Based on the relief which the applicant seeks the Board to grant, namely to direct the holding of a new representation election, it is evident that this proceeding does not stand separate and apart. Even if the Board were to direct a representation election that, in itself, would be a futile act unless the Board were to use the evidence so gained to either affirm or to revise, revoke, alter or amend its decision of November 22, 1977 in the certification proceeding. The question then becomes whether the applicant through the use of the Board’s processes under a section 79 complaint is entitled to, in effect, seek a review or reconsideration of the November 22, 1977 decision.

21. All of the material facts alleged in this application were known to the applicant when the certification proceeding came on for hearing: in fact, those allegations directly bearing on the respondent union and the respondent employer were pleaded in the applicant’s application (except for the incidents of August 31, 1977 which occurred on the day the application was filed with the Board) to demonstrate a contravention of the Act such as to make it unlikely that the true wishes of the employees would not be made known in a representation vote [sic]. The applicant chose not to proceed with those allegations for reasons of its own. By so doing the applicant was, in effect, saying to the Board that it was content for the Board to base its decision on all the evidence then before it, part of which would be the results of the representation election as the applicant well knew. In our opinion the applicant cannot now be heard to say in this proceeding that the evidence, which it elected not to present during the certification hearing, is now to be considered fresh evidence which was not before the Board at the time of its November 22, 1977 decision which should now be considered and which will demonstrate that the election results were invalid. For the Board to countenance such a proceeding, would in our opinion be an abuse of the Board’s processes.”

Similar considerations do not apply in the present case. If the present applicant had indicated in its initial certification application an intention to rely upon section 7a and had then abandoned this position in favour of exclusive reliance upon the results of a vote, the situation might well be different. However, this is not what has occurred in the present case.

13. The Board has not adopted a rigid, legalistic approach in respect of timeliness considerations concerning requests for certification pursuant to section 7a. For example, in *Dylex Limited*, [1977] OLRB Rep. June 357, counsel for the respondent employer contended that the applicant union should not be certified pursuant to section 7a because it had failed to raise its allegation (that the respondent through certain of its actions had violated section 56 of the Act) with the Board prior to the taking of the certification vote, but instead had waited until after the results of the vote had been made known. The Board rejected this submission and granted certification under section 7a. (See also *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562.) A similar approach has been adopted in relation to the filing of

particulars in support of a section 7a application; in *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. Apr. 338, the applicant union did not file particulars of alleged misconduct by the respondent employer in support of a request for certification without a vote under section 7a until eight clear days had elapsed after the events giving rise to the allegations. In allowing the applicant to adduce evidence in support of the allegations, the Board stated at paragraph 4:

“While it is possible in the instant case that the allegations could have been made earlier, the timing of their filing did not itself lead to an adjournment, nor did it cause prejudice, embarrassment or unnecessary delay or expense to the respondent.”

14. Considerations of administrative efficiency and expeditiousness are of such importance in some instances as to render considerations of prejudice irrelevant (see, for example, *H.D. Lee, supra*). However, the present case is not such an instance as there is no specific time limit (such as a terminal date or a date by which a statement of desire to make representations to the Board concerning any matter relating to a representation vote must be filed) applicable to the invocation of section 7a.

15. Although there is no requirement that notice of intention to rely upon section 7a be given at any particular stage of a certification application, that does not mean that an applicant can with total impunity delay unduly in giving such notice. Failure by an applicant for certification to notify the respondent of its intention to rely upon section 7a reasonably in advance of a hearing may provide the respondent with a valid basis for requesting an adjournment. Such adjournment of a certification hearing will generally delay the disposition of the certification application to the detriment of the applicant. A belated invocation of section 7a might also prompt the Board to draw the inference that the employer's contravention of the Act was probably not so flagrant as to make it unlikely that the true wishes of the employees can be determined through a vote, since egregious employer conduct of that sort will generally result in the affected union applying for certification under section 7a with considerable expedition.

16. If the present application constituted the first notice to the respondent of the allegations upon which the section 7a application is based, the respondent might very well have a valid objection on the basis of non-compliance with the timeliness requirements of Rule 47. However, that is not what occurred in the present case; it was not disputed that the allegations of misconduct upon which the applicant relies were brought to the attention of the respondent in a timely manner by the commencement of the aforementioned section 79 proceedings. The failure of the applicant to request certification under section 7a does not, in our view, preclude the applicant from requesting such relief in the present certification application which is properly before the Board. If the respondent has contravened the Act as alleged by the applicant, we see no reason why the applicant, after receiving at the pre-hearing vote meeting the additional information necessary to realistically assess whether or not reliance upon section 7a would be necessary, should not be able to apply to the Board for certification under section 7a. The Board rejects the respondent's submission that notice of the applicant's intention to rely upon section 7a must be contained in the applicant's initial certification application. In attempting to obtain certification, the applicant's first choice was the expedited procedure of a pre-hearing vote. The Board recognizes that a trade union can have sound practical reasons for preferring that procedure over the protracted proceedings frequently involved in section 7a applications. An application under section 7a, with its inherent delays, is antithetical to the

very purpose of an application for certification via pre-hearing vote. Thus, in the circumstances of the present case in which there is no indication of lack of good faith on the part of the applicant, the Board rules that the applicant was under no obligation to notify the respondent of its intent to rely upon section 7a until it had been given a reasonable opportunity following the pre-hearing vote meeting to assess its membership position and determine whether reliance upon section 7a would be necessary. Although the respondent has lost the possible procedural advantage of an opportunity to argue that the applicant should be required to proceed first with its evidence in consolidated section 79 and section 7a proceedings, this possible prejudice is outweighed by the considerations set forth above which have led the Board to conclude that the applicant should be permitted to proceed with a section 7a application in this case. Moreover, it should be noted that although the initial burden of going forward ("a burden that might be termed the 'evidential burden'": see *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665, paragraph 5) may be placed on the complainant in a case in which the section 79(4a) "reverse onus" applies only to some but not all of the allegations made by the complainant, this change in the order of proceeding does not affect the application by the Board of the ultimate reversal of "legal" burden of proof set forth in section 79(4a) to those allegations to which it has application (see *Craftline Industries Limited*, [1977] OLRB Rep. Apr. 246, paragraph 2; and *I.C.B. Warehousing Division of Alar-Anson*, [1976] OLRB Rep. Oct. 621).

17. Accordingly, the Board rules that the applicant is entitled to seek certification under section 7a in the instant case.

18. The matter is referred to the Registrar to be listed for hearing.

2434-79-R; 2435-79-R The Lake Ontario District Council of the United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Spanway Building Systems Ltd.; Amorico Associates Ltd., and Spanway Buildings Limited, Respondents.**

Sale of a Business – Transfer of exclusive franchise

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members C. G. Bourne and O. Hodges.

APPEARANCES: *Douglas J. Wray and Quintin Begg for the applicant; no one appearing for the respondents Spanway Building Systems Ltd. and Amorico Associates Ltd.; R. M. Parry, J. Allan Broatch and Thomas C. Kavanagh for the respondent Spanway Buildings Limited.*

DECISION OF THE BOARD; June 17, 1980

1. The name "Spanway Buildings Ltd." appearing in the style of cause of the application in File No. 2435-79-R as the name of the respondents is amended to read "Spanway Buildings Limited".

2. These are two applications in which the same applicant is seeking relief under the successor rights and related employer provisions of *The Labour Relations Act*. At the hearing into the applications, the Board directed that they be consolidated.

3. File No. 2434-79-R is an application under section 1(4) of the Act in which the applicant is seeking a declaration from the Board that the two respondents be treated as one employer for purposes of the Act. On the evidence before it, the Board finds that Spanway Building Systems Ltd. ("Spanway Systems") and the applicant are bound to the provincial collective agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America ("the provincial agreement") which expired April 30, 1980. These bargaining rights apply within Board Areas No. 9, 10, 11 and 12 pertaining to the construction industry. Effective September 12, 1979, by Articles of Amendment issued pursuant to *The Business Corporations Act*, R.S.O. 1970, c. 53, Spanway Systems changed its name to Amorico Associates Ltd. ("Amorico"). As of the same date, Amorico changed its address to 79 Wilkinson Avenue, Oshawa, Ontario from P.O. Box 1194, Peterborough, Ontario. Since this is the only evidence before the Board as to the relationship between Spanway Systems and Amorico, the Board finds that they are not two associated or related businesses within the meaning of section 1(4) of the Act and this application is dismissed. The change of name of itself, however, did not destroy or alter the applicant's bargaining rights existing under the provincial agreement for Spanway Systems employees. In this respect the Board also takes note of section 9 of *The Business Corporations Act*, *supra*, which provides that "A change in the name of a corporation does not affect its rights or obligations."

4. File No. 2435-79-R is an application under section 55 of the Act in which the applicant is seeking, amongst other things, a declaration of the Board that there has been a sale of a business from Spanway Systems to Spanway Buildings Limited ("Spanway Buildings"). While the applicant alternatively sought in its application to have the Board declare under section 1(4) of the Act that the two entities be treated as constituting one employer for the purposes of the Act, it did not pursue this Branch of its application. The application is dismissed, therefore, insofar as it pertains to section 1(4).

5. The applicant alleges that Spanway Buildings is the successor employer to Spanway Systems by reason of a sale of a business between them within the meaning of section 55 of the Act and is thereby bound to the provincial agreement, as it applies to Board Areas No. 9, 10, 11 and 12, in the same manner as Spanway Systems is bound. The findings of fact herein are derived from the evidence of the witnesses of the respondent Spanway Buildings pursuant to its onus under section 55(13) of the Act. No one appeared for Spanway Systems and the applicant adduced evidence only in respect of its bargaining rights under the provincial agreement.

6. Spanway Buildings was incorporated under *The Business Corporations Act*, *supra*, on August 31, 1979 and its articles of incorporation show its objects to include the object "to carry on business as a building contractor". It is owned equally by J. Allan Broatch, its president and Thomas C. Kavanagh, its secretary-treasurer, each of whom testified at the hearing. Broatch's initial investment in the corporation was in the form of certain assets which he purchased from Spanway Systems plus his personal vehicle, while Kavanagh's was cash. Spanway Buildings engages in two kinds of construction work. It is agent in the counties of Peterborough, Victoria and Haliburton for Armso pre-engineered steel buildings and supplies and constructs these buildings, usually functioning as a general contractor. In addition, it acts as

project manager for purchasers of conventional construction. Since incorporation and up to the time of the hearing into these applications, Spanway Buildings has completed two Armco projects, was working on a third one and was performing its first project management contract. The gross value of the three Armco jobs was estimated by Broatch to be \$350,000 to \$400,000 and the fee for the project management contract approximately \$50,000.

7. Broatch had been employed by Spanway Systems before starting his venture with Kavanagh from February 1975, a month after the company started in business, until June or July 1979 when it ceased doing business in the Peterborough area. During this entire period his primary job was that of estimator and apart from the president of the firm, Broatch was the only full-time employee continuously associated with it. He had no financial interest in it beyond his employment. The president (and, according to Broatch the principal owner) of Spanway Systems, Aubrey Morrison, had other business interests which he wished to consolidate and move to Oshawa. Spanway Systems held the franchise for Armco buildings which Spanway Buildings now holds. The last Armco building which Spanway Systems had built in the Peterborough area was in May 1978 and the last work it had performed in the area was May 1979. Around April 1979 Morrison told Broatch that he planned to wind down the business and surrender the Armco franchise and asked him if he had any interest in buying the assets. This was the beginning of three to four months of activity by Broatch which culminated with the launching in business of Spanway Buildings.

8. He contacted Armco about obtaining a franchise for the Peterborough area. In May or June he told Kavanagh of Morrison's intention to give up the Armco business and asked if Kavanagh was interested in going into business with him. Spanway Systems surrendered the Armco franchise on July 31, 1979. This was essential before Broatch or anyone else could get an Armco franchise. They are not transferable and are exclusive for the territory. As long as Spanway Systems held the franchise, Armco would not issue another. By mid-August Broatch had received oral assurances that Armco would make him its dealer for the same territory. On August 22nd Broatch and Morrison agreed that Broatch would buy the assets of Spanway Systems and Morrison would consent to the use of the name Spanway Buildings Limited. At about the same time Kavanagh agreed to join in business with Broatch and Spanway Buildings Limited was incorporated on August 31st as previously noted. The former assets of Spanway Systems which Broatch contributed to the new company were purchased by him under a bulk purchase agreement executed September 10, 1979 for a total of \$11,138, none of which was in consideration of Morrison's consent to the use of the same Spanway Buildings Limited or in respect of any other goodwill. These were all of the assets of Spanway Systems and included office furnishings and equipment. They also were all of the assets which Spanway Systems employed for its Armco business during the time Broatch worked for the firm and were all that Spanway Buildings required to begin its Armco business and the new firm could not have started its business without the same kinds of assets. These assets, according to Broatch, were only a small part of what would be needed for a conventional construction business. Spanway Buildings has since obtained a second and larger construction trailer (for use in its project management contract) and a second Suter level.

9. Sometime in September, the exact date not being in evidence, Broatch and Morrison, who was acting for Spanway Systems, entered into a separate covenant that Morrison would not compete with Broatch within Peterborough or within an area 35 miles from the boundary of Peterborough, except for one specified building complex. No restrictions were placed on Broatch.

10. Spanway Buildings occupies the same premises that Spanway Systems had used on the same monthly rental basis without a formal lease. September 1979 was the first month that Spanway Buildings paid rent. During the two prior months neither respondent rented the premises, but Broatch had use of them and periodically used the office while getting organized in business. This location did not serve as the postal address for either respondent. Both use post office boxes, but different ones and Spanway Buildings has a different telephone number, different company logo and different letterhead than Spanway Systems.

11. While Broatch and Kavanagh were organizing themselves to start up in business and before Spanway Buildings was incorporated, they actively considered alternative ways of starting out. Through Kavanagh they had the opportunity to get a franchise for another type of pre-engineered steel building, but he also admitted that Armco was their preference from the start because he viewed it as the best of the “component systems” buildings on the market. Both believed that the name Spanway, having been identified in the Peterborough area with Armco buildings, would be an asset if they obtained that dealership. In fact Broatch said acquisition of the use of the name was a top priority. On the other hand, it is evident that they would not have used Spanway if they had not got the Armco franchise.

12. From its incorporation August 31, 1979, Spanway Buildings performed its first Armco project in September and October 1979. On this project the client was his own general contractor, on the other two Spanway Buildings was the general contractor. While there is some variation in the work performed according to the particular contract and Spanway Building’s role, the nature of the work done by Spanway Buildings is identical to that which Spanway Systems did on Armco building projects. The work at various stages is of the type usually performed by carpenters, ironworkers and labourers. On the first Armco project, Spanway Buildings hired one of the persons who had formerly worked for Spanway Systems and had last worked for it in May 1979. Broatch considered him to be the best Armco building man in the area. Spanway Buildings also hired a former labourer of Spanway Systems in March 1980. Except for Broatch himself, these are the only former Spanway Systems employees who have worked for Spanway Buildings.

13. Where a business, or part of it, is sold, leases, transferred or otherwise disposed of, section 55 of *The Labour Relations Act* provides that the purchaser is subject to the same collective bargaining obligations as was the vendor in respect of the business which changed hands between them until the Board declares otherwise. That provision operates to preserve established bargaining rights and to give them a degree of permanence. See for example the Board’s decision in *Marvel Jewellery Limited and Danbury Sales (1977) Ltd.*, [1975] OLRB Rep. Sept. 733 and 735. Before a transaction is captured by section 55 affirmative answers to two related questions must be found in the facts of the transaction. The Board’s decision in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at paragraph 28 puts the questions in the following manner:

“...has there been a ‘sale’ within the extended statutory definition of that term; and does what has been ‘sold’, ‘transferred’ or ‘disposed of’ constitute a ‘business’ or ‘part of a business’.”

The Board’s numerous decisions in section 55 applications show that deciding those two questions is essentially a factual matter to be determined by the particular facts in each case as revealed by examining the entire transaction and not just its outward legal form. While the

Board has considered a wide variety of factors, its decisions indicate the realization that the absence or presence of a particular factor is not decisive. See for example, the Board's decision in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 at paragraph 16. At the same time, the Board has recognized two factors to be of general relevance, the importance of which being such that their presence supports a strong inference that there has been a section 55 sale of a business. (See *Dennis Moran Limited*, [1977] OLRB Rep. Apr. 237.) These are:

- (a) the nature of the work performed after the transaction being substantially similar to the work performed before; and
- (b) the transfer of goodwill, whether specified or not in the terms of the transaction.

14. The facts in this case reveal that Spanway Buildings was formed by the partnership of Broatch, who was the only continuous employee presence in Spanway Systems other than Morrison its principal owner and Kavanagh who had no prior association with Spanway Systems. Spanway Buildings took over the same premises that Spanway Systems had occupied under the same terms and conditions. While there was a two-month hiatus between Spanway Systems vacating the premises and Spanway Buildings occupying them, Broatch continued to occupy and use the office on the premises and the office equipment during that time while organizing to start up Spanway Buildings. Through Broatch, the new company acquired all of the assets which the old one used for supplying and erecting Armco buildings, the same Armco dealership held by the old company and the "no competition" covenant. The assets were all that Spanway Buildings needed for its Armco business and, except for a second Suter level, it has not had to add to these assets for that part of its business. There was no transfer of employees from the old company to the new one nor was there any significant hiring by Spanway Buildings of former Spanway Systems employees.

15. Spanway System's surrender of the Armco dealership was obviously the triggering event in a series of events over the ensuing eight-week period at the end of which Spanway Buildings had:

- (a) replaced Spanway Systems as Armco dealer in the identical territory;
- (b) acquired the right to use the "Spanway" name and exercised that right in incorporating Spanway Buildings;
- (c) acquired all of the old company's assets, these being all that the new company needed to carry on business as the Armco dealer;
- (d) acquired and exercised the right to conduct its business from the same premises as the old company had used and under the same terms;
- (e) obtained the commitment that the old company would not compete with it; and
- (f) started its first Armco project (within four weeks of incorporating

Spanway Buildings) performing the same work using work crews composed of the same skills and hiring a former employee of the old company whom Broatch deemed to be the best skilled Armco man he had seen.

Thus the transaction has resulted in a transfer of substantial goodwill from the old company to the new one: the exclusive territorial representation of Armco, which Kavanagh considers to have the best product; the right to use the name Spanway which for four years had been identified with Armco buildings and freedom from competition from the old company. There can be no doubting the importance to the new company of the consent for it to use the name Spanway in association with Armco buildings. Obtaining this consent was top priority for Broatch and its desirability was acknowledged by Kavanagh if they were to get the Armco dealership, all of this in spite of the good name of Armco itself. Furthermore, after the transaction the new company was performing the same kind of work requiring use of the same kind of skills as was the case with the old company before the transaction. In addition, Spanway Buildings was employing the same assets and operating out of the same premises on the same terms as Spanway Systems. The only visible elements of the old company which are not present in the new one are Morrison (the owner), the telephone number, post office box mailing address and company logo and letterhead. While the exclusion of a specified building complex from the “no competition” agreement infers that the old company may have retained a part of its former business, everything else of substance in the business of Spanway Systems has been transferred to Spanway Buildings by the transaction between them; there was little else that could have been transferred and was not.

16. While Spanway Buildings has added project management of conventional construction projects to its business, this neither detracts from the fact that it is carrying on substantially the same business in substantially the same way that Spanway Systems was before the transaction nor represents a change in the character of the business so that it is (in the words of section 55(5) of the Act) “substantially different from the predecessor employer”. Moreover, the Board is not persuaded by the argument that Spanway Buildings is a new, “parallel” business to Spanway Systems which incidentally has acquired its assets. Spanway Buildings has acquired much more than assets as noted above and has done so behind the shield of the “no competition” agreement, circumstances which are quite different from those in *Ralph Ford Electrical Contractors Limited*, [1974] OLRB Rep. June 388, in which case the Board found that there had not been a transfer of a business, but rather that a new, parallel business had been created.

17. Having regard to all of the foregoing, the Board finds that there has been a sale of part of the business of Spanway Systems to Spanway Buildings and, therefore, a sale of a business within the meaning of section 55 of the Act has occurred. Consequently, the Board declares that Spanway Buildings Limited is bound to the provincial agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America which was in effect from September 6, 1978 to April 30, 1980, to the same extent that Spanway Building Systems Ltd. was bound and is subject to the rights, obligations and duties that flow from it. In this respect, the Board draws the attention of the parties to section 125(2) of the Act which came into force effective May 1, 1980 and which is set out below:

“Where an employer is represented by a designated or accredited em-

ployer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 3 of section 106, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights."

1603-79-U International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and Local 636, Complainant, v. Thomas Built Buses of Canada Limited, Respondent.

Interference in the Trade Union – Withholding of Union dues pursuant to collective agreement – Whether permissible – Whether acting in accordance with agreement – Failure to remit dues collected violating section 56

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members C. G. Bourne and H. Simon.

APPEARANCES: *L. MacLean, Q.C., Lorne Charlick, Gary Roberts, Cliff Binns and Jack Dunne for the complainant; T. F. Storie and Larry Bannon for the respondent.*

DECISION OF THE BOARD:

1. The United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 636 have complained to the Labour Relations Board that the grievors have been dealt with by the respondent, Thomas Built Buses of Canada Limited, contrary to the provisions of sections 37, 42 and 56 of *The Labour Relations Act*.

2. By a decision dated February 8, 1980 the Board held that it would not defer to the jurisdiction of a board of arbitration that had been constituted to hear a grievance arising out of the facts which form the basis of the union's complaint before this Board. Those facts were set out in paragraphs 4 through 7 of that decision:

"4. It is common ground between the parties that a two day work interruption occurred at the respondent's plant commencing on October 3, 1979. Although the union denies liability for the work interruption, the company took steps to invoke article 5.06 of the collective agreement in effect between the parties which reads as follows:

'The Union and the employees agree that in return for such Union security they must accept the liability for any violation of the 'no strike' provisions of this Agreement.

Accordingly, it is agreed that in the event of any violation of the 'no strike' clause of this Agreement by the Union and/or the employees, or a group of employees, the Company may at its discretion file with the Union a statement as to the appropriate penalty in the form of a cancellation of dues deduction and/or in the form of loss of seniority or a fine upon the employees. In the event that the parties are unable to agree upon the disposition of the matter, then either party may submit the dispute to a Board of Arbitration and the parties shall be bound by its decision.'

The company has not submitted a grievance against the union claiming damages for the work interruption. Instead, on October 4th, the company sent the union the following statement pursuant to article 5.06 of the agreement:

'October 4, 1979.

Mr. Vern Eaton,
Chairman of Thomas Brand, Local 636,

AND

Mr. Lorne Charlick,
International Representative U.A.W.

STATEMENT BY THE COMPANY PURSUANT TO SECTION 5.06 RE THE ILLEGAL STRIKE

Pursuant to section 5.06 of the Collective Agreement and arising out of the illegal strike commencing on or about October 3, 1979, the Company herewith files a statement as to the appropriate penalty for breach of Article 4 of the Collective Agreement.

- (1) For each day the strike continues commencing October 3, 1979, one month's Union dues shall be withheld and not forwarded to the Financial Secretary of the Local as referred to in Section 5.04.
- (2) Each employee participating in the illegal strike commencing on or about October 3, 1979 or thereafter shall be subject to a fine in the amount of one day's pay, at base rate, for each day or part thereof on which they participated. Such deductions, to be made at a time determined by the Company following the conclusion of the illegal strike.

This statement is filed pursuant to Section 5.06 of the Collective Agreement. It in no way precludes the Company's position with

respect to discipline up to and including discharge of employees for their participation in the illegal strike.

Larry Bannon,
Vice-President & General Manager.'

5. Approximately 67 employees out of approximately 90 in the bargaining unit participated in the work stoppage. On October 5th the company gave a written warning to approximately 15 of the employees and notified the other 52 that they would be subject to a two-day suspension with loss of pay. Counsel for the complainant stated that the union considered that the above noted discipline administered to the employees who participated in the work interruption was a substitute for the fines proposed in the company's letter of October 4th. We note that at the hearing, however, counsel for the employer indicated that the company still intended to impose the fines.

6. In response to what the union viewed as the only outstanding penalty proposed in the company's October 4th letter filed pursuant to article 5.06 of the agreement, the union, in a letter to the company dated October 9, 1979, requested the company to withdraw its intention to withhold union dues. The union indicated that its letter should be viewed as a grievance lodged pursuant to the terms of the collective agreement.

7. In a letter which the parties agree should be dated October 26, 1979, the company informed the U.A.W. and its Local 636 of its decision to implement its previously announced intention to withhold union dues:

'This is to advise you that further to our letter of Oct. 4, 1979 and pursuant to Article 5.06 of the Collective Agreement we are withholding [sic] Union dues for the months of October and November 1979.

These funds will be held in escrow pending a decision from the board of arbitration.'

It is common ground between the parties that pursuant to this letter the company declined to remit to the union dues deducted from all the employees' wages for the months of October and November 1979. In a letter dated November 24, 1979 the company informed the union that the dues withheld totalled ... \$2,385.20."

3. At the hearing convened to determine the merits of the union's complaint counsel for the company raised two preliminary matters. Following the Board's decision to take jurisdiction to hear the union's complaint, the company, without admitting a violation of *The Labour Relations Act*, offered the union a sum of money equal to the amount of union dues it had withheld from the union for the months of October and November, 1979. Based on this offer the company argued that the substance of the complaint had been dissolved and asked

the Board to dismiss the complaint. The union declined to accept the money as a full settlement of the complaint and requested the Board to determine the merits.

4. The Board unanimously ruled that the company's offer to pay the union the withheld dues did not dispose of the union's complaint that the company had violated *The Labour Relations Act*. In the absence of an admission of wrong doing in violation of the Act, the union is entitled to the opportunity to prove its allegations. Further, the union is entitled to argue, as it has, that the appropriate remedy for the violation extends beyond the mere re-payment of the withheld dues.

5. Counsel for the company further argued that the union should be restricted to its alleged violation of section 56 of the Act and should not be permitted to attempt to prove the other allegations set out in the original complaint. Counsel argued that the Board's interim determination declining to defer to arbitration addressed the union's allegations under section 56 of the Act rather than the others and that the union should, therefore, be restricted to its section 56 claim. The Board did not accept the company's argument in this regard and in a unanimous oral ruling stated that it would not restrict the complainant's case in the manner so requested. The union's allegations relating to a breach of section 56 of the Act were alone sufficient to cause the Board to decline to defer to arbitration. It was, therefore, unnecessary for the Board to consider the other alleged violations of the Act in its interim decision. The Board's focusing in its interim decision on the union's allegations under section 56 of the Act, however, cannot by itself circumscribe the scope of the complaint. The union did not express an intention to restrict itself solely to its section 56 claim and the Board has been given no cause to impose such a restriction.

6. We turn now to the merits of the complaint. Pursuant to article 5.06 the company filed with the union a statement indicating its intention to both withhold from the union one month's dues deducted from the employees for each day of the strike and impose fines on participating employees. The union immediately notified the company that it did not agree with the company's disposition of the matter. Although the union indicated to the company that it was submitting its disagreement to a board of arbitration pursuant to the terms of article 5.06, the company, on October 26, 1979, advised the union of its intention to forthwith commence implementation of its decision to withhold from the union dues it had deducted from all employees.

7. The union contends that the company's implementation of its chosen course of action under article 5.06, in the face of the union's dispute, violates section 37 of *The Labour Relations Act* which stipulates as follows:

"Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable."

The company, on the other hand, argues that article 5.06 anticipates that the company may implement its chosen penalty whenever it considers it to be appropriate. If the union disputes the company's action then, in the company's view, its recourse is to take the matter to arbitra-

tion. The company argues, however, that the existence of a dispute does not require it to wait for the final and binding decision of the board of arbitration before implementing its chosen penalty.

8. Whether the union is correct and article 5.06 requires that disputes over the appropriate penalty be referred to a board of arbitration for final determination prior to an implementation of the company's chosen penalty or whether the company is correct in its view that the union's disagreement cannot interfere with the original implementation of the company's chosen disposition, the Board is satisfied that there has been no violation of section 37 of *The Labour Relations Act*. Even if the company's interpretation contravenes article 5.06, the company does not dispute the necessity for, at one point or another, referring the disagreement to arbitration. Sooner or later arbitration is available as a mechanism to resolve the dispute. There is nothing, therefore, either in the collective agreement or the conduct of the company that is in contravention of the fundamental protection of section 37 of the Act.

9. With respect to the alleged violation of section 56 of the Act, the company contends that its failure to remit dues to the union was "a cancellation of dues deduction" within the meaning of article 5.06 of the collective agreement. The company argues that its holding of the union's dues was a course of conduct agreed to in principle by the union as an appropriate response to an unlawful work stoppage which cannot constitute a violation of section 56 of *The Labour Relations Act*. In support of its argument, and seeking to distinguish its actions from those of the employer in *Truck Engineering Limited*, [1978] OLRB Rep. Jan. 70, the company emphasized that it did not hold the deducted dues pending the union's payment of a company claim for damages for the work stoppage. Instead it held them in escrow with the intention of returning them to the employees in the event that a board of arbitration held that its actions were in accordance with article 5.06. The penalty to the union was being deprived of dues it otherwise would have received automatically.

10. The union argues that even if the company's action could be characterized as a "cancellation of dues deduction", its conduct would be contrary to section 36a of *The Labour Relations Act* and, therefore, invalid notwithstanding the fact that a temporary "cancellation of dues deduction" may have been agreed to in principle by the union through the signing of the collective agreement. Section 36a(1) provides as follows:

"Except in the construction industry, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision that at the written request of an employee in the bargaining unit the employer shall deduct from the wages of the employee the amount of the regular union dues payable by members of the trade union and remit the amount to the trade union."

11. The form of union security agreed to by the parties in this case is set out in article 5.04 of the collective agreement:

"As a condition of employment effective on date of ratification all current and future employees who have completed their probationary period will authorize the Company in writing to deduct from their wages an amount equal to the regular monthly Union dues as prescribed by the

Constitution of the Union (See Form 1). Monies deducted in accordance with this section shall be forwarded to the Financial Secretary of Local 636 prior to the end of the month in which such deductions are made.”

Through article 5.06 the union has further agreed that under certain circumstances it may be appropriate for the company to suspend the dues deduction procedure which is otherwise mandatory under the collective agreement.

12. The union argued that the deduction of dues upon the request of an employee is a minimum standard of union security provided for in *The Labour Relations Act*. As a matter of public policy, the union argues, any provision in the collective agreement which has the effect of forfeiting this minimum statutory standard is null and void.

13. Section 36a of *The Labour Relations Act* effectively removes the issue of the voluntary check off of union dues from the bargaining table. It stipulates that union security in the form of voluntary dues check off shall be included in the collective agreement if requested by the union. The Act does not, however, suggest that this form of union security is an essential term of a collective agreement. A union may choose, for example, to negotiate a closed shop, but in return be satisfied with collecting its own dues. The section anticipates that the inclusion in the collective agreement of voluntary check off is at the sole discretion of the union. Just as the union is entitled to request it, so is it entitled not to request it, or to request it in a modified form.

14. To suggest that a union would be acting contrary to public policy by agreeing in certain instances to the temporary forfeiture of this minimum form of union security contradicts the very terms of section 36a which unequivocally provide the union with an elective right, a right which may or may not be invoked. The argument of counsel for the union would transform this elective right into a statutory duty and fly in the face of the language of the Act.

15. The Board concludes, therefore, that section 36a of *The Labour Relations Act* does not itself preclude the company from engaging in a “cancellation of dues deduction” as long as it’s done in accordance with the terms of the collective agreement. In this instance, however, the Board is of the further opinion that the company’s action of deducting union dues from all employees and holding them in escrow rather than remitting them directly to the union does not fall within the scope of “a cancellation of dues deduction” and, therefore, was not done in accordance with article 5.06.

16. “Cancel” is defined in *Webster’s Third New International Dictionary* as follows:

“1: CANCELLATION: the act of annulling or rescinding.”

“Annul and “rescind” are defined, respectively, as

“annul: 1a: to cause to cease to exist : reduce to nothing : blot out :
OBLITERATE ... b: to check effectively : to make inoperative... :
neutralize, cancel

rescind 1: to do away with : take away : remove... 2a: to take back :
annul, cancel”

The company in this case did not either annul or rescind the deduction of dues. Although the company interrupted the normal flow of the dues by holding them in escrow once deducted rather than remitting them to the union, the company did not engage in a "cancellation of dues deduction". The company continued to deduct dues from the employees' wages. In the Board's view, the "cancellation of dues deduction" anticipates that the employer will not deduct dues in the first place, thus setting the onus of their collection on the shoulders of the union. To cancel dues deduction requires the company not to engage in the deduction of dues in the first place. It is a contradiction to suggest that one can cancel dues deduction by continuing dues deduction.

17. The Board concludes, therefore, that the company's actions do not fall within the scope of article 5.06 of the collective agreement. In *Truck Engineering Limited, supra*, the Board reached a similar conclusion. At p. 75 the Board said,

"Counsel for the respondent contended that the Board should not find the respondent's actions to have been in violation of the Act in that they were expressly countenanced by article 7(d) [identical to article 5.06] of the collective agreement. We are, however, unable to agree with this assessment. Although article 7(d) does provide that under certain conditions the respondent can propose a cancellation of dues deductions, a loss of seniority or a fine upon the employees, the article cannot, as claimed by respondent's counsel, reasonably be interpreted as providing for a right on the part of the respondent to deduct sums from employees' wages in the form of dues deduction and then not to forward the dues so deducted to the union. There exists a real difference between not deducting union dues and the arbitrary impounding of dues once they have been deducted. . . ."

18. The Board's finding that the company's actions were not in accordance with the provisions of article 5.06 of the collective agreement because the company continued to make dues deductions from the employees' wages should not be understood as implying that, in the opinion of this Board, the company would have been acting in compliance with article 5.06 if it had simply stopped its dues deduction procedures. In the event of a violation of the "no strike" provisions of the collective agreement, article 5.06 gives the company the right to file with the union a statement as to the appropriate penalty as provided therein. Whether the company has the further right to implement its proposed disposition forthwith or whether, in the face of a dispute from the union, the company's implementation must await the final determination by a board of arbitration of the appropriateness of the proposed disposition is a matter of disagreement between the parties as indicated in paragraph 7 above. The proper timing of the implementation of the company's disposition is not a question that need be resolved by this Board in determining the union's complaint that the company has violated section 56 of *The Labour Relations Act*. It is an issue that would normally be determined by a board of arbitration in the course of interpreting article 5.06 of the collective agreement. Accordingly, this Board expresses no opinion on the matter.

19. We turn now to the main branch of the complaint. Was the company's failure to remit to the union dues deducted from employees for October and November 1979 a violation of section 56 of the Act? Section 56 provides as follows"

“No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.”

20. The union contends that by depriving the union of its basic source of income, union dues, the employer interfered with the administration of the union contrary to section 56 of the Act. The union argues that the employer’s interference with the administration of the trade union by withholding dues strikes at the foundation of the union’s existence and its ability to represent employees. Without dues the union loses the means by which it can effectively represent employees. The union contends that the withholding of its source of income and, thereby, its ability to function properly as a trade union, undermines the viability of the union and discredits it in the eyes of employees.

21. In *Truck Engineering Limited, supra*, the Board dealt with an alleged violation of section 56 arising out of a similar fact situation. The collective agreement in question in *Truck Engineering* contained a clause identical to article 5.06. There too the company deducted dues from employees but refused to forward them to the union. In that case the company held the funds pending the payment by the union of damages suffered by the company as a result of the October 14, 1976, Day of Protest.

22. In that case at pp. 72 and 73 the Board explained that not all administrative interferences suffered by a union at the hands of a company could be properly characterized as violations of section 56:

“The result of the respondent’s actions is that the complainant has not received dues from its members that it otherwise would have received. To this extent the respondent had disrupted the administration of the complainant trade union. The mere fact that an employer’s actions have adversely affected a union, however, is not a sufficient basis upon which the Board can conclude that there has been a violation of section 56. The Board in interpreting section 56 recognizes that collective bargaining is essentially and adversarial process. Inherent in the process is the risk that one or both of the parties might suffer as a result of a legitimate stand taken by the other side. Goals and objectives, even those most closely held, will not always be attained. Unpalatable demands made by the other side may have to be acceded to. In bitterly contested disputes one of the parties may well suffer serious damage which could impair even its ability to continue to function. Where the adverse [effect] on either party is of this nature, arising out of a legitimate industrial relations stance adopted by the other side, the Board has been careful to characterize it in terms of “the wear and tear of collective bargaining” and not as constituting the type of interference prohibited by section 56. (See: *A.A.S. Telecommunications Ltd. and Zipcal Ltd.*, [1976] OLRB Rep. Dec. 75 and *A.N. Shaw Restoration Ltd.*, [1976] OLRB Rep. Sept. 504.)”

23. In determining whether the obvious interference with the administration of the trade union resulting from the company's failure to remit dues was a violation of section 56, the Board made the following observations at pp. 73 and 74:

"In this case did the respondent by checking off but then retaining union dues interfere with the administration of the complainant union contrary to section 56? The checking off of union dues is essentially an administrative procedure by which the employer first deducts from the wages otherwise owing to employees amounts equivalent to the union dues owed by the employees to the union and then forwards the funds involved in a lump sum to the union. If a check off system is not employed then the union is required to go through the time and effort of collecting the dues directly. This could be done in a variety of ways including having someone collect union dues at the work place, having members pay their dues at the union office or by having members send in their dues to the union by mail. The process of collecting dues directly from the members is particularly common in the construction industry where although collective agreements generally require that an employer hire only union members, frequently the agreement makes no provision at all for the checking off of union dues.

Where a dues check off system is employed, the employer acts essentially as a collector of moneys due and owing from the employees to the union. The employees have earned the full amount of the wages from which the dues are deducted, but on the basis of the terms of a collective agreement and individually signed authorizations the employer deducts from the wages owing amounts equivalent to the sums owed by the employees to the union. In so doing the employer does not personally become entitled to the money in that he is acting merely as an agent for the collection and transmission of the dues to the union. (See *Re United Steelworkers of America and Brooks Manufacturing Co. Ltd.* (1969), 20 L.A.C. 298 [Weiler].) The employer possesses no authority to do anything with the money so obtained other than to forward it to the union. This point was expressed as follows by an American court when faced with an employer who had checked off union dues from employee wages but had failed to remit them to the union involved. (*Robertson v. Eastern Airlines Inc.* 50 L.C. Para. 19,380 [N.Y. Sup. Ct. – Dec. 9, 1964]):

'Without challenging [the] defendant's motives for continuing the check off system subsequent to the June 23, 1962 date, the court discerns no basis in the statute or in precedents to sustain the defendant's unilateral decision to establish a new check off system, one in which the employer deducts the dues and retains them in escrow, trust or like status in accordance with its rationale. This gratuitous assumption of authority and responsibility by the employer will not be countenanced by the court. The authority of the employer in operating the check off system was for a limited purpose, i.e. to forward such dues to the plaintiff union.' "

The Board thereupon concluded that the company's conduct was a violation of article 56 of the Act. At pp. 74 and 75 the Board said,

"As distinct from the situation where an employer fails to make any dues deductions, in the instant case the respondent continued to check off union dues from employee wages. This is thus not a case where employees could simply turn to an alternative procedure for paying their dues. Having deducted the money in the form of dues payments, the respondent failed to fulfill its responsibility of forwarding the sums to the complainant union in accordance with the terms of the employee authorizations. In doing so we are of the view that it directly interfered with the flow of union dues to the complainant from those of its members employed by the respondent, and that this unilateral action constituted a form of direct interference with the administration of the complainant contrary to section 56 of the Act. What we have here is the unilateral impounding of union dues and not a mere failure to deduct union dues from employee wages. . . .

As an alternative submission, counsel for the respondent contended that the respondent had believed that article 7(d) gave it the authority to do what it did, and thus at most all that was involved was a misinterpretation of a collective agreement. Counsel submitted in this regard that the Board should not find an employer to be in breach of *The Labour Relations Act* merely because it had misinterpreted a clause in a collective agreement. As a general principle we agree with this proposition. Disputes which center around differing interpretations of the provisions of a collective agreement are generally best left to the grievance-arbitration procedures provided for in the collective agreement itself. However, this does not mean that an employer can misinterpret a collective agreement in such a way as to come into conflict with some substantive provision of the Act and then point to the collective agreement as a shield for his actions. The substantive rights of employers, employees and trade unions as set forth in the Act do not cease to operate upon the signing of a collective agreement. Thus the fact that the respondent may well have felt that it was acting in accordance with the terms of the collective agreement is not a sufficient defence to a violation of the Act."

24. Consistent with the Board's decision in *Truck Engineering*, this panel of the Board is also of the view that the company's failure to turn over to the union dues deducted from the employees constitutes a violation of section 56. The Board concludes that this course of conduct was not within what reasonably may have been considered by the company to have been within the scope of article 5.06. In this regard we note that article 5.06 was negotiated into the collective agreement between the parties to this complaint after the Board's decision in *Truck Engineering*, wherein the Board had already held that failing to remit deducted dues was not "a cancellation of dues deduction". The company's conduct falls outside what might properly be characterized as the "wear and tear of collective bargaining" and fundamentally jeopardized the union's ability to effectively function as a bargaining agent. It is precisely this type of interference that is proscribed by section 56 of the Act.

25. The Board is satisfied that the company's failure to remit to the union deducted from the employees for the months of October and November 1979 constitutes an unfair labour practice in violation of section 56 of the Act. The Board therefore orders that the company, forthwith, pay the union a sum equal to the union dues withheld by it for October and November 1979. Additionally, following the Board's decision in *Hallowel House Limited*, [1980] OLRB Rep. Jan. 35, the Board orders that the company pay interest on the sum referred to above in accordance with the principle set out in the *Hallowel House* decision.

26. The Board remains seized of the case in the event that a dispute arises over the implementation of this award.

1594-79-R The Association of the Teaching Staff of Trent University, Applicant, v. Board of Governors, Trent University, Respondent.

Employee – Whether College Heads managerial – Little input on matters affecting the members of faculty bargaining unit – Supervisory responsibility of support staff – Whether establishing managerial status

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Edward A. Bartley and Prof. David Kettler for the applicant; Ms. Janice A. Baker, Ken Hayes and Robert Chambers for the respondent.*

DECISION OF THE BOARD; June 6, 1980

1. This is the continuation of an application for certification. In its decision dated December 18, 1979 the Board certified the applicant on an interim basis, pursuant to its discretion under section 6(1a) of *The Labour Relations Act*, and appointed an Examiner to inquire into the duties and responsibilities of the persons classified as "College Heads". The Board has had an opportunity to review the report of the Examiner, and as well received the submissions of the parties on the report at a hearing scheduled for that purpose.

2. There are five separate colleges associated with Trent University, three of them on campus, and two of them located in the City of Peterborough itself. Each college has a "Head" or "Master" appointed by the President. The colleges provide not only a residence for students attending the University, but certain administrative and counselling services as well. The latter are extended to non-residents as well, so that Champlain College, for example, includes within its program some 210 resident students, plus an additional 240 non-resident students. Faculty members are assigned to and associated with the various colleges, but not on a departmental basis. The College Head himself is normally a faculty member, although not necessarily. When a faculty member, the College Head is responsible in an academic sense to the Chairman of the Department in which he actually teaches, and in an administrative sense to the Vice-President. He receives his base salary as a faculty member, plus an increment of \$3500.00. Twenty per cent of the base salary is charged to the academic department in which he teaches.

Of the remaining salary plus increment, 25% is charged to the College's operating budget and 75% to the student services budget of the University. Unlike Department Chairmen, the College Heads are listed in the calendar as officers of the University.

3. The parties agreed that the evidence of Dr. John Burbidge, Head of Champlain College, would be representative of the duties and responsibilities of all of the College Heads at the University. As College Head, Dr. Burbidge has no academic responsibilities, but rather, receives a reduced teaching workload in recognition of his administrative responsibilities. He estimates that his time is split roughly 50-50 between his various academic responsibilities as a faculty member, including attendance at committee meetings, and his administrative responsibilities in running the College.

4. Dr. Burbidge testified that there are three main areas of responsibility for the College Head: responsibility for the physical plant itself, which includes being responsible for those people who are maintaining the physical plant and for setting budgets for major maintenance and repair; responsibility for developing a community program which will enhance the overall academic atmosphere of the College; and responsibility for the allocation of offices and secretarial staff to faculty members serving as Fellows of the College. The College does not itself offer academic courses for credit.

5. There are three types of operating accounts with which the College Head is associated. The first covers the area of the dining hall services. Dr. Burbidge indicated that while he has responsibility for that area, in fact the responsibility is delegated to someone else, so that he has minimal supervision in that area. The second is the area of the college operating account, which includes a large amount of support staff salaries. Dr. Burbidge has no control over the budgeted amount for those salaries. He does, however, have discretionary input into amounts budgeted for major plant maintenance and repair projects. The third area is the student activities budget, which is made up of a per capita student levy, plus endowments or gifts to the college fund. Dr. Burbidge has wide discretion in the allocation of these funds.

6. As a faculty member, Dr. Burbidge from time to time sits on various committees which may affect the employment conditions of faculty members, but he has no special input in this regard as a College Head. As a College Head, he is a member of the Senate, but not the Board of Governors. His input is solicited annually on questions of promotions or special increments for faculty members within his college, but it appears that he is simply one of many sources consulted in this regard. He also sits on a sub-committee of the Senate referred to as the Committee on Colleges. The composition of this committee includes faculty members and students as well. He has no authority whatever to take any disciplinary or other negative action against a faculty member.

7. Clearly, the major area of responsibility of the College Head, for the purposes of this application, is the area of support staff for the college. It is made up essentially of secretaries and housekeeping staff. In connection with secretarial staff, all of the current secretaries have been at Champlain College for a considerable period of time, so that Dr. Burbidge has not had to become involved in hiring any of them. As mentioned, he is responsible for assigning secretaries to faculty members, but beyond that there is of course no need for him to make daily assignments of work. Dr. Burbidge is responsible for ensuring that vacations are taken in a manner which will maintain coverage, although it appears that this problem tends to sort it-

self out. If, however, there are complaints by faculty members about a secretary's work, Dr. Burbidge indicates that it is up to him to "move in in a disciplinary way". In addition, Dr. Burbidge has direct responsibility over the porter of the college, the head housekeeper, and the full housekeeping staff, comprised of some 12 or 13 persons, and he regularly oversees and inspects their work. The hiring of persons to fill these positions is ultimately the decision of Dr. Burbidge, although he would never do this without being in consultation with the Personnel Office. Dr. Burbidge did, in fact, perform this responsibility in hiring the present head housekeeper, as the former head housekeeper resigned on the day that Dr. Burbidge became College Head. In addition, it is his responsibility to hire and supervise the "college secretary" (as opposed to the academic secretaries), and his own assistant. It is difficult to determine from the evidence what discretion the College Head has with respect to salaries for the above persons. It is clear that the College Head is confined by the budgeted amount for salaries, and he does not have the authority to move funds from other accounts into the salary account. However, Dr. Burbidge testified that when he asks Personnel questions of policy relating to promotions or salary increments, he normally is told: "Whatever you think you can do". With respect to his own assistant, it is clear that Dr. Burbidge decides at what level in a fixed range he is to be paid. Dr. Burbidge makes formal recommendations to Personnel at the end of the probationary period for support staff, and these recommendations have always been accepted. He has the authority to take disciplinary action with respect to the support staff, although he indicates that he would never fire someone without, again, consulting with Personnel. He can authorize overtime, and has granted time off on his own to support staff, for example, at Christmas time.

8. Normally, the College Head sits on three committees directly related to the administration of the college. The first is the College Council, which is a meeting of all the Fellows and Dons of the College where general policy affecting the college is discussed. The second is the College Executive, composed of six members of the College Council, plus a number of student appointees. Dr. Burbidge indicated that in his normal operating of the college, it is the College Executive which makes policy decisions on behalf of the College, because of the Executive's representative nature. He indicates, however, that he has the ultimate authority to exercise his own discretion and not take the advice of the committee, though he adds that it would be generally unwise politically to do so. He has in fact done that only once. The final committee is the Residents Council, which is a representative group of the students of the residences together with their Dons, whose purpose is to discuss questions of residence policy.

9. From the above, it can be seen that the College Head has little input into decisions which affect other members of the faculty. He has significant responsibilities in the area of student programmes and development, but such areas obviously have limited labour relations implications. The important area, clearly, is the College Head's role as chief administrator of the college, and his substantial responsibility for the support staff in that regard. The support staff are, of course, not a part of the applicant's bargaining unit. The Board has decided, however, that the exclusion under section 1(3)(b) of *The Labour Relations Act* does not require that managerial responsibilities be exercised in connection with the particular bargaining unit being examined. See *Globe and Mail Limited*, [1976] OLRB Rep. Nov. 662, at paragraph 13. This issue was considered as well in some of the earlier decisions involving university faculty bargaining units, and the Board has carefully reviewed those decisions, as requested by the applicant. In both the *Carleton University* case, [1975] OLRB Rep. June 500 and the *University of Windsor* case, [1977] OLRB Rep. May 300, the Board held that the infrequent exercise of authority by Department Chairmen over the support staff in their department was not suf-

ficient, in itself, to justify the Chairmen's exclusion from the bargaining unit, particularly since the support staff formed no part of that bargaining unit. In saying this, however, the Board noted in the *Carleton University* case in particular, at paragraph 23:

"It is important to emphasize that the overwhelming proportion of the Chairmen's duties have nothing whatever to do with the supervision or control of the department's small clerical staff".

Overall, the Board in that case decided, also at paragraph 23:

"We cannot conclude that Departmental Chairmen perform functions sufficiently different from those of their departmental colleagues to warrant their exclusion from the bargaining unit."

The Board finds, however, that the same cannot be said for the College Heads which are the subject of examination in the present case. They are effectively charged with the running of the college, from an administrative and supervisory point of view, and this aspect of their responsibilities occupies a full 50% of their university time. Accordingly, the Board finds that the College Heads of the respondent do exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*, and accordingly are excluded from the applicant's bargaining unit.

10. The Board therefore finds that all faculty and professional librarian appointments at Trent University in Peterborough, save and except sessional faculty and professional librarian appointments teaching one and one-half courses or less, or the equivalents, the President, Vice-Presidents, Deans, Associate Deans, Registrar, Associate Registrars, Assistant to the President, College Heads, either the University librarian or the Director of the library, faculty members on the Board of Governors, and faculty and professional librarian appointments employed at Trent University for a term of two years or less while on leave from other employers, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. A formal certificate will now issue to the applicant.

0224-80-R; 0225-80-R Service Employees International Union, Local 183 A.F. of L., C.I.O, C.L.C., Applicant, v. **Trent Valley Lodge Ltd.**, Respondent.

Membership Evidence – Form 8 declaration irregular – Evidence disclosing necessary inquiries not made with respect to all membership cards – Board not relying on Form 8 declaration

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

***APPEARANCES:** Jeffrey Egner and Phylis Marier for the applicant; K. W. Kort, Dr. T. G. Watts and Mrs. Jean Ogden for the respondent.*

DECISION OF THE BOARD; June 2, 1980

1. These are two applications for certification which were consolidated by the Board.
2. The name of the respondent is amended to read: "Trent Valley Lodge Ltd."
3. At the hearing, a preliminary matter arose concerning one of the Form 8 declarations filed in support of the applicant's membership evidence. The declaration purports to be made by Phylis Marier, the Union's organizer, but was signed "Phylis R. Marier/per JS". The Board accordingly asked Mrs. Marier, who was present at the hearing, to take the witness stand and explain the circumstances under which the Form 8 was signed.
4. Mrs. Marier has been an organizer for Local 183 of the Service Employees International Union, the applicant, since October of 1979. Her office is in Belleville. The Form 8 in question accompanied 19 of the 26 membership cards submitted by the applicant with its two applications. Mrs. Marier was not the actual collector on any of the cards submitted by the applicant. She testified that the campaign was well under way by the time she was introduced by the Local President to the two individuals who were doing the collecting, and roughly half of the cards submitted had already been signed at that time. From that point it became her responsibility to do the "paperwork" for the campaign and help with house calls if necessary. The cards which had already been signed were turned over to her along with the dollars collected. At that point Mrs. Marier asked the two collectors if each girl that signed a card had paid the dollar and they responded that each girl had. The three then mapped out the rest of the campaign. As additional cards were collected by these two individuals, the cards would be given to one of them, who would then bring them in to Mrs. Marier's office. Mrs. Marier is only in her office approximately one day a week, and the collector would leave the cards with the secretary if Mrs. Marier was not there. Mrs. Marier testified that she would quite often call the collectors after cards were left at her office and ask them how they were making out, or they might call her and let her know that they had left additional cards with the secretary. On these occasions, according to Mrs. Marier's evidence, the discussion would normally concern whether the collectors had any other employees in mind to visit. Once, one of the collectors told Mrs. Marier that she had to go back to see one particular employee again because the girl did not have the dollar on her first visit, and Mrs. Marier responded, "that's good", meaning it was proper to wait until the employee had the dollar. In contrast to the cards left at her office, Mrs. Marier's testimony was that when any cards were handed to her directly, she went over

them with the collector personally and asked whether a dollar had been paid to the person who signed as collector.

5. There were three Form 8 Declarations concerning Membership Documents filed in support of the two applications for certification. Two of those Form 8's, including the one in question, were signed and submitted by mail on April 29th. The terminal date for the applications was May 8th. On the day the forms were mailed, Mrs. Marier had signed the first form but left to deal with another nursing home in Gananoque before signing the second. Mrs. Marier phoned in to her office, and the secretary advised her tht she had forgotten to sign the second Form 8. Mrs. Marier at that point was 68 miles away from her office, and explained to the Board that if she returned that day to sign the form, she would arrive after the post office had closed. She was anxious that all of the material go to the Board at once, and the Local President had asked her to get it in as soon as possible. Since she had checked all of the membership cards in the morning, she asked her secretary to read the Declaration to her paragraph by paragraph. When the secretary had done that, Mrs. Marier instructed her to sign and mail the form. The final point to be mentioned is that Mrs. Marier indicated that the manner of making inquiries which she described in connection with the Form 8 signed by her secretary was the manner applied in connection with the forms which she signed herself.

6. On examining the evidence as set out above, it appears that Mrs. Marier made the inquiries necessary to complete the Form 8 Declaration with respect to any cards which were delivered to her personally, but the same cannot be said for membership cards left at her office when she was absent. Paragraph 3 of Form 8 reads:

“(Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE TIME FOLLOWING INSTANCES:”

Mrs. Marier's evidence amounts to this: that sometimes she made the inquiries necessary to the proper completion of the Form 8 Declaration, and sometimes she did not. The Board, however, has always required a higher standard of compliance than that in dealing with the Form 8 Declaration, because of the *total* reliance which the Board normally places on that Declaration in accepting hearsay evidence of membership. See *National Steel Car*, [1966] OLRB Rep. Jan. 738; and *N & D Supermarket Limited*, [1976] OLRB Rep. Mar. 112. The Board notes, for example, that the failure to make inquiries in the present case would never have come to the Board's attention had it not been for the circumstance of Mrs. Marier's secretary signing on her behalf on one of the forms. The Board does not have to deal in this case with the effect that that fact alone would have had other than to express its concern that having a Form 8 signed by someone other than the declarant (even though openly) could, in some circumstances, raise a question over the appreciation of the solemnity of that declaration, and the reliance which the Board normally places upon it.

7. The evidence discloses however that the necessary inquiries were in fact *not* made with respect to all the cards submitted through Mrs. Marier, as required by Form 8. This omission raises a question concerning a substantial number of the cards filed; it is impossible for the Board to determine from the evidence precisely which cards, and how many. From Mrs. Marier's evidence, the cards in support of the second application appear to be affected as well, those cards appearing by their dates to fall within the latter half of the applicant's organizing campaign, being the period over which uncertainty has arisen. The final Form 8 submitted on May 5th clearly falls into this category as well. In the result, the Board finds that it is unable to place reliance on any of the Form 8's filed in support of these two applications, and there being no substantiation, as required by the Board, of the membership evidence submitted, both applications are hereby dismissed.

8. As indicated when these reasons were delivered orally at the hearing, the Board wishes to make it clear that it has found no intent on the part of the applicant to deliberately mislead the Board nor any defect in the membership cards themselves as far as they go. The defect is in the inadvertent omission of the necessary inquiries to substantiate that evidence, through the Form 8 Declaration, and it is on that basis that the applications have been dismissed.

0176-80-R Ontario Association of Weight Counsellors, Applicant, v. Weight Loss Inc., Respondent.

Bargaining Unit – Certification – Membership Evidence – No date on cards – Whether acceptable – Employer operating in three municipalities – Whether one unit appropriate

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members T. G. Armstrong and C. A. Ballentine.

APPEARANCES: *B. P. Bellmore for the applicant; W. J. McNaughton and E. Foote for the respondent.*

DECISION OF THE BOARD; June 6, 1980

1. This is an application for certification in which the applicant was required to establish its status as a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

2. A question was raised at the hearing with respect to the failure of the founding group of employees to confirm the election of officers who had been elected prior to the adoption of the constitution. The whole transaction of election of officers, adoption of the constitution and the signing of members occurred at the same meeting which was held on March 26, 1980. As the Board has said in similar cases, it would be overly technical to insist upon a rigid sequence of events when the whole transaction is carried out at the same meeting. In the present case, as already noted, all steps were taken at the one meeting and the failure to reconfirm the officers does not constitute grounds for denying the applicant of status as a trade union.

3. A further objection was raised with respect to the membership evidence since the documents presented as evidence of membership were undated. The Board, having regard to the definition of “member” and “membership” set out in section 1(1)(j) of the Act in the following terms:

“1.-(1) In this Act,

(j) ‘member’, when used with reference to a trade union, includes a person who,

(i) has applied for membership in the trade union, and

(ii) has paid to the trade union on his own behalf an amount of at least \$1 in respect of initiation fees or monthly dues of the trade union,

and ‘membership’ has a corresponding meaning;”

and it being plain that the membership evidence indicated an application and the payment of \$1.00 by the employees concerned, heard oral evidence to establish the dates at which the cards were signed as evidence substantiating the written evidence, pursuant to section 48(2) of the Rules of Procedure. The Board is satisfied that none of the membership cards were signed prior to the founding meeting and none were signed or filed after the terminal date. The membership cards are accordingly accepted as proper evidence of membership in the applicant.

4. The Board accordingly finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.

5. The applicant seeks to be certified as bargaining agent for all employees of the respondent below the rank of Clinic Director at the respondent’s clinics at Hamilton, Burlington and London.

6. The respondent proposes that there be three separate bargaining units with each confined to the clinics in the cities of Hamilton, Burlington and London respectively.

7. The respondent also proposed that the units be described as comprising all registered and graduate nurses at each of the municipal clinics. This latter request was based upon the insubstantial grounds that a bargaining unit of the employees of the respondent at St. Catharines represented by the Ontario Nurses’ Association is so described. As the Board indicated at the hearing, an all-employee unit, subject to certain exemptions set out later, is appropriate in the circumstances.

8. In support of its contention that the bargaining unit should cover the Municipalities of Hamilton, Burlington and London as one unit, the applicant cited the *Adams Furniture Co. Ltd.* case, [1975] OLRB Rep. June 491. That case dealt with the coverage of several municipalities in one bargaining unit. In the *Adams* case the Board dealt with an application for certification in which the applicant sought a unit comprising all employees of the respondent in the Regional Municipality of Niagara and Dunnville. The Board found a community of interest to

exist between employees in the municipalities of Welland, Port Colborne, Fort Erie (which are in the Regional Municipality) and Dunnville which is just outside the regional municipality. The Board also found a significant degree of interchange of employees between the stores in these municipalities and a significant degree of administrative control. On that basis the Board found that employees at Welland, Port Colborne, Fort Erie and Dunnville (only one full-time person was employed at the latter) comprised an appropriate unit. At the same time, the Board found that employees at Niagara Falls and St. Catharines, both of which are in the Regional Municipality of Niagara, did not have a community of interest and separate units for each of these cities were found to be appropriate.

9. In the present instance the municipalities involved are not part of a common municipal region nor does any situation exist similar to that at Dunnville. There is no suggestion of any interchange between the employees in the municipalities, significant or otherwise, in the instant case so that notwithstanding the fact that there is general overall management of the individual offices, and the work is similar, the Board is not persuaded that there is a community of interest between the employees in the three separate municipalities such as to cause the Board to find that the employees in the three cities form an appropriate combined bargaining unit. (See *Canada Trustco Mortgage*, [1977] OLRB Rep. June 330).

10. The Board accordingly treats the application as relating to three separate bargaining units of employees of the respondent at Hamilton, Burlington and London respectively.

11. There was disagreement between the parties as to exemptions from the bargaining unit claimed by the respondent. The latter seeks to exclude Area Director, Assistant Area Director, office and sales staff and persons regularly employed for not more than 24 hours per week. The applicant agrees to the exclusion of Director, but objects to the exclusion of certain persons as "sales staff" and 24-hour people. The respondent has persons regularly employed for not more than 24 hours per week and the Board grants the request for their exclusion from the units of full-time employees.

12. The persons whose status is in dispute are Sarah C. Bethune, classified as Assistant Director, employed at Hamilton, whose exclusion is sought under section 1(3)(b) of the Act, and Sandar L. McGlynn-McVey, whose exclusion is sought on the grounds that she is a sales person. She is employed at London. A third exclusion was sought for Ricky Wraight as a sales person employed at Burlington. Wraight, however, is in the group of employees regularly employed for not more than 24 hours per week. This group does not have sufficient membership to entitle it to certification or a vote in any event, so that the request need not be inquired into further.

13. Accordingly, the Board appoints Ms. B. McLean, Labour Relations Officer, to inquire into the duties and responsibilities of Sarah C. Bethune and Sandra L. McGlynn-McVey, and report to the Board thereon.

14. The Board has determined, however, that the applicant's right to certification at Hamilton cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the Assistant Director. On the basis of all the evidence before it, the Board is satisfied that, in any event, more than fifty-five per cent of the employees of the respondent in the bargaining unit at Hamilton, at the time the application was made, were members of the applicant on May

5, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. Accordingly, the Board, pursuant to its discretion under section 6(1a) of the Act and pending the final resolution of the composition of the bargaining unit, certifies the applicant as the bargaining agent for all employees of the respondent at Hamilton, save and except Area Director, persons above the rank of Area Director, office and sales staff, and persons regularly employed for not more than 24 hours per week and, pending the resolution of the status of this category, excluding as well the Assistant Director.

16. A formal certificate must await the final determination of the appropriate bargaining unit.

17. The Board finds that all employees of the respondent at Burlington, save and except Area Director, persons above the rank of Area Director, office and sales staff, and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

18. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on May 5, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. A certificate will issue to the applicant.

20. The final disposition of the application with respect to the employees at London must await the outcome of the report of the Labour Relations Officer with respect to the duties and responsibilities of Sandra L. McGlynn-McVey.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR BOARD DURING MAY 1980

BARGAINING AGENTS CERTIFIED DURING MAY

No Vote Conducted

0716-78-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamster, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. A. Cupido Haulage Limited (Respondent), - and -

0717-78-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Canada Crushed Stone, a Division of Steeley Industries Limited (Respondent) v. United Steelworkers of America (Intervener).

Unit: "the dependent contractor/owner/operator/truck drivers of the respondent Canada Crushed Stone working at or out of the Canada Crushed Stone quarry on Highway #5, Hamilton." (16 employees in the unit).

1201-78-R: Labourers' International Union of North America, Local 183 (Applicant) v. Thames Steel Construction Limited (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent in the Regional Municipality of Halton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (36 employees in the unit).

0696-79-R: Ontario Public Service Employees Union (Applicant) v. Art Gallery of Ontario Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the Art Gallery of Ontario in the Municipality of Metropolitan Toronto, save and except Branch Heads, persons above the rank of Branch Head, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, security officers and the following: Administrative Assistant to the Director, Secretary to the Director, Secretary to the Chief of Administration, Personnel Officer, Personnel Secretary/ Assistant, Purchasing Agent, Payroll Officer, Manager-Dining Services, Assistant Manager - Dining Services, Executive Chef - Dining Services, Development Officer, Secretary to Development Officer, Co-Ordinator of Volunteer Activities, Manager - Membership Services, Publicity and Promotion Co-Ordinator for Tut, Co-Ordinator of Gallery Activities, Supervisor of Maintenance, Administrative Secretary to Head of Education Services, Supervisor General Accounting, Computer Operator, Accounting Clerk, Manager - Tutankhamun, Co-Ordinator of Tutankhamun, Tutankhamun Store Manager, Assistant to Tutankhamun Store Manager, Secretary to Chief Curator, Manager of Exhibitions, Registrar, Conservator, Chief Preparator, Librarian, Library Co-Ordinator, Co-Ordinator of Photographic Services, Head of Publications, Keeper of the Grange, Senior Education Officer/ Elementary Tours, Senior Education Officer/ Secondary Tours, Senior Education Officer/ Deputy Head, Head of Activity Centre, Audio-Visual Centre Head, Training Officer, Head of Technical Services, Curators, Gallery Shop Administrator, Head of Communications, Media Production Head, Secretary to the Manager of Public Affairs. (168 employees). (*Upon agreement of the parties*). (*clarity note*).

0833-79-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canadian Road Asphalts Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at or out of the City of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (8 employees in the unit).

0966-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. P.J. Wallbank Manufacturing Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Highway #97, Washington, Ontario, save and except Night Foreman, Foreman Torsion Dept., Foreman Home-Workers Dept., Foreman Grinding Dept., and those above the rank of such enumerated foremen, office and sales staff." (60 employees in the unit).

1117-79-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Simmons Limited (Respondent).

Unit: "all office and clerical employees of the respondent in the City of Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, professional engineers, sales persons, Credit Manager, Personnel Assistant, Engineering & Technical Staff, Sales Trainee and the Secretary to the General Manager." (20 employees in the unit). (*clarity note*).

1315-79-R: Canadian Paperworkers Union (Applicant) v. Atlantic Packaging Products Limited (Respondent) v. Printing Specialties & Paper Products Union, Local 701 (Intervener).

Unit: "all employees of the respondent in Ingersoll, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in the unit).

1615-79-R: United Food and Commercial Workers International Union (Applicant) v. Sunnylea Foods Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the City of Grimsby, save and except forepersons and persons above the rank of foreperson, office staff, sales staff, students employed during holiday and vacation periods and persons regularly employed for not more than 24 hours per week." (40 employees in the unit). (*Having regard to the agreement of the parties*).

2071-79-R: Printing Specialties & Paper Products Union, Local 466 (Applicant) v. Esselte Meto Limited (Respondent).

Unit: "all employees of Esselte Meto in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and clerical staff, sales employees, and students employed during the school vacation period." (4 employees in the unit).

2155-79-R: United Food and Commercial Workers International Union, AFL, CIO, CLC. (Applicant) v. Hostess Food Products Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent, at 41 Brockley Drive, Hamilton, Ontario, save and except territory sales supervisors, warehouse supervisors, office staff, students hired for school vacation periods and persons regularly employed for not more than 24 hours per week." (23 employees in the unit). (*Having regard to the agreement of the parties*).

2180-79-R: Canadian Union of Public Employees (Applicant) v. St. Lawrence Centre for the Arts (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week, save and except Assistant House Manager, Assistant Box Office Manager, persons above the rank of Assistant Manager, and persons covered by subsisting collective agreements." (42 employees in the unit). (*Having regard to the agreement of the parties*).

2236-79-R: United Steelworkers of America (Applicant) v. Dorcy Ashflash Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in the unit). (*Having regard to the agreement of the parties*).

2309-79-R: Ontario Public Service Employees Union (Applicant) v. Five Counties Children's Centre (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the City of Peterborough, Ontario save and except Department Heads and Supervisors, persons above the rank of Department Head and Supervisor, office and clerical employees, Therapists, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (11 employees in the unit). (*clarity note*).

2350-79-R: Canadian Union of Public Employees (Applicant) v. Barrie Public Library (Respondent).

Unit: "all employees of the respondent in the City of Barrie, save and except Chief Librarian, Assistant Chief Librarian, Secretary to the Chief Librarian, Bookkeeper, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (21 employees in unit).

2352-79-R: Canadian Union of Public Employees (Applicant) v. The Shaver Hospital for Chest Diseases (Respondent).

Unit: "all paramedical personnel of the respondent at St. Catherines employed as registered technologists, non-registered technologists, radiological technologists and respiratory technologists, save and except supervisors, persons above the rank of supervisor, Chief Technologist Radiology, Nutritionist, Activity and Volunteer Co-Ordinator, students employed under a co-operative training programme, persons employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (11 employees in the unit). (*Having regard to the agreement of the parties*).

2387-79-R: Graphic Arts International Union, Local 542 (Applicant) v. Kerr-Progress Printing Limited (Respondent) v. International Typographical Union (Intervener).

Unit: "all typesetting and art department personnel in the employ of the respondent in the Regional Municipality of Cambridge, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to a decision dated July 25, 1978, upon the agreement of the parties*).

2402-79-R: Labourers' International Union of North America, Local Union 183 (Applicant) v. Schaeffer & Reinthaler Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all field employees of the respondent engaged in surveying operations in and out of Metropolitan

Toronto, save and except party chiefs, persons above the rank of party chief, sales, office and clerical staff." (10 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2409-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Pitts Atlantic Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (25 employees in the unit).

2447-79-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Brights Wines Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent employed in its retail stores in Metropolitan Toronto, save and except store managers, persons above the rank of store manager, office and clerical employees, salesmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (21 employees in the unit). (*By agreement of the parties*). (*clarity note*).

Unit #2: (*See Certification Dismissed, No Vote Conducted*).

Unit #3: "all office and clerical employees of the respondent in Metropolitan Toronto save and except office manager, persons above the rank of office manager, salesmen." (3 employees in the unit). (*By agreement of the parties*).

2454-79-R: Graduate Assistants Association (Applicant) v. The Board of Governors of the Ontario Institute for Studies in Education (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: "all graduate assistants employed by the respondent in Metro Toronto through the office or offices responsible for administration of such assistantships and registered at the respondent as Graduate, Special or Certificate Students save and except those graduate assistants whose salaries are paid from other than operating funds, temporary research officers, those graduate students employed on an extramural stipend and those persons covered by subsisting collective agreements." (300 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2461-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Protective Plastics Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Huron Park, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (87 employees). (*Having regard to the representations of the parties*).

0003-80-R: United Food & Commercial Workers International Union Local Union 175 (Applicant) v. Ontario Food Division (Food City) of the Oshawa Group Limited (Respondent).

Unit: "all employees of the respondent in its retail stores in Brantford regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Manager, those above the rank of Manager, and office staff." (35 employees in the unit).

0007-80-R: Ontario Public Service Employees Union (Applicant) v. Town of Midland Board of Park Management (Respondent).

Unit: “all employees of the respondent in the Town of Midland, Ontario, save and except Arena Manager, persons above the rank of Arena Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

0020-80-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. John M.M. Troup Limited (Respondent).

Unit: “all plasterers and plasterers’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*clarity note*).

0032-80-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508 (Applicant) v. Lukes Industrial Services Limited (Respondent).

Unit: “all pipefitters and pipefitters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*clarity note*).

0034-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Coca-Cola Limited (Respondent).

Unit: “office employees of Coca-Cola Limited at Ottawa, Ontario, save and except office manager, assistant office manager, confidential secretary to the General Manager, persons above the rank of office manager, foreman, sales supervisors, and persons regularly employed for not more than 24 hours per week.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

0035-80-R: Ontario Nurses’ Association (Applicant) v. Weight Loss Incorporated (Respondent).

Unit: “all registered and graduate nurses in the employ of the respondent at St. Catherines, Ontario, save and except supervisors and persons above the rank of supervisor.” (4 employees). (*Having regard to the agreement of the parties*).

0041-80-R: Office and Professional Employees International Union (Applicant) v. Hamilton Wentworth Credit Union Limited (Respondent).

Unit: “all employees of the respondent in the Towns of StoneyCreek and Dundas, save and except Branch Manager, persons above the rank of Branch Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

0046-80-R: Ontario Public Service Employees Union (Applicant) v. Ottawa General Hospital (Respondent).

Unit: “all ambulance dispatchers employed by the respondent working at or out of its hospital in the City of Ottawa, save and except dispatch supervisor, senior dispatcher, persons above the rank of dispatch supervisor and senior dispatcher, office and clerical staff and persons covered by subsisting collective agreements between the Ottawa General Hospital and the Canadian Union of Public Employees, the Canadian Union of Public Employees, the Canadian Union of Operating Engineers and General Workers, the Ontario Nurses’ Association and the Ontario Public Service Employees Union.” (9 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0051-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Green Shield (Prescription Services) Incorporated (Respondent).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except managers, persons above the rank of manager, and sales representatives." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0052-80-R: International Union of Operating Engineers Local 793 (Applicant) v. The Corporation of the Village of Stirling (Respondent).

Unit: "all employees of the Corporation of the Village of Stirling in its Public Works Department, save and except non-working Foremen and those above the rank of non-working Foreman, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0064-8-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL, CIO, CLC., (Applicant) v. The Miner Company Limited (Respondent).

Unit: "all employees of the company at its plant in Smith Falls save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff." (33 employees in the unit). (*Having regard to the agreement of the parties*).

0066-80-R: United Glass and Ceramic Workers of North America (Applicant) v. Graham Fiber Glass Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at the plant in Erin, save and except the foreman, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (111 employees in the unit). (*Having regard to the agreement of the parties*).

0068-80-R: Canadian Paperworkers Union, CLC, (Applicant) v. Becon Envelopes, Division of Barbecon Incorporated (Respondent).

Unit: "all employees of the respondent at Downsview, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for 24 hours or less per week, and summer students employed during school vacation period." (26 employees in the unit). (*Having regard to the agreement of the parties*).

0071-80-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 6645 Tecumseh Rd. E., in the City of Windsor, Ontario, save and except hostesses and persons above the rank of hostess." (51 employees in the unit). (*Having regard to the agreement of the parties*).

0075-80-R: The Canadian Union of Public Employees (Appliant) v. The Perley Hospital (Respondent).

Unit: "all employees of the respondent employed at the Perley Hospital in Ottawa, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineer, office staff, persons regularly employed for more than 24 hours per week, persons covered under the collective agreement between the

Canadian Union of Public Employees in its Local 870 and Perley Hospital and the collective agreement between Ontario Nurses' Association and the Perley Hospital." (64 employees in the unit). (*Having regard to the agreement of the parties*).

0092-80-R: Ontario Public Service Employees Union (Applicant) v. Oakville Association for the Mentally Retarded (Respondent).

Unit: "all employees of the respondent employed in or out of the town of Oakville, save and except Office Manager, Residence Supervisors, Assistant Workshop Manager of claycrafters, persons above the rank of Assistant Workshop Manager, Director of Peter Pan Nursery, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (11 employees in the unit). (*Having regard to the agreement of the parties*).

0099-80-R: United Cement, Lime and Gypsum Workers International Union (Applicant) v. Barry J. Lawrence Management Limited, Plastics CMP Limited (Respondents).

Unit: "all employees of the Barry J. Lawrence Management Limited employed at Plastics CMP Limited in the Municipality of Peterborough, Ontario, save and except foremen and persons above the rank of foreman, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0103-80-R: Graphic Arts Union, Local 669, subordinate to the International Printing and Graphic Communications Union (Applicant) v. The Spectator, A Division of Southam Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: "all employees in the Circulation Department of the respondent at Hamilton, Ontario, save and except Assistant Supervisors, those above the rank of Assistant Supervisor, secretary to the Circulation Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (42 employees in the unit). (*Having regard to the agreement of the parties*).

0117-80-R: Canadian Union of Public Employees (Applicant) v. Ontario Cancer Foundation, Hamilton Clinic (Respondent).

Unit #1: all paramedical personnel of the respondent at Hamilton employed as Registered Therapeutic Radiological Technologists save and except Chief Technologists, persons above the rank of Chief Technologist, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all paramedical personnel of the respondent at Hamilton employed as Registered Therapeutic Radiological Technologists regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Chief Technologist." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0120-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Lucy Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and

except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0124-80-R: Restaurant, Cafeteria and Tavern Employees Union, Local 254 Hotel & Restaurant Employees & Bartenders International Union (Applicant) v. Dalmar Foods Limited (Respondent).

Unit: "all employees of the respondent employed at the Ministry of Transportation and Communications, in Metropolitan Toronto, save and except Manager, persons above the rank of Manager and office staff." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0127-80-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Findlay-Jones Insulation Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0129-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Dundas and Scarlett Development Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0130-80-R: Ontario Public Service Employees Union (Applicant) v. Fleetwood Ambulance Services (Respondent).

Unit #1: "all employees of the respondent employed in or out of the Regional Municipality of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (19 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent employed in or out of the Regional Municipality of Hamilton-Wentworth, regularly employed for not more than 24 hours per week and students employed during the school vacation, save and except supervisors, persons above the rank of supervisor." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0137-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sonterlan Construction Corporation (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0138-80-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Seaforth Building Group o/b 330012 Ontario Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0154-80-R: London & District Service Workers’ Union Local 220 (Applicant) v. The Corporation of the City of London (Dearness Home) (Respondent).

Unit: “all employees regularly employed for 24 hours per week or less and students employed during the school vacation period save and except foremen and foreladies and those above the rank of foreman and forelady.” (24 employees in the unit). (*Having regard to the agreement of the parties*).

0185-80-R: The Canadian Union of Public Employees (Applicant) v. Chateau Gardens Nursing Home (Respondent).

Unit: “all employees of the respondent at its nursing home at Lancaster, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except office, professional and medical staff, registered, graduate and undergraduate nurses, supervisors and persons above the rank of supervisor.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

0198-80-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Ontario Food Division (Food City) of the Oshawa Group Limited (Respondent).

Unit: “all employees of the respondent in its retail stores in St. Catharines, who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except manager, persons above the rank of manager and office staff.” (37 employees in the unit). (*Having regard to the agreement of the parties*).

0205-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Brights Wines Limited (Respondent).

Unit: “all employees of the respondent employed in its retail stores in the Town of Pickering, save and except store managers, persons above the rank of store manager, office and clerical employees and salesmen, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0206-80-R: Canadian Union of Public Employees (Applicant) v. Village of Fenelon Falls (Respondent).

Unit: “all employees of the respondent in the Village of Fenelon Falls, save and except Clerk-Treasurer and office staff.” (2 employees in the unit).

0231-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Allied Chemical Canada Limited (Respondent).

Unit: “all secretaries of the respondent at Amherstburg, Ontario, save and except persons covered by the existing agreement between the respondent and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) covering Office and Technical Workers of Local 89 (UAW).” (5 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0235-80-R: Canadian Union of Public Employees (Applicant) v. Board of Water Commissioners for the Town of Lindsay (Respondent).

Unit: "all employees of the respondent in the Town of Lindsay, save and except administrator and office staff." (13 employees in the unit).

0250-80-R: Christian Labour Association of Canada (Applicant) v. Heritage House Rest Home (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Sarnia, save and except registered nurses, supervisors, persons above the rank of supervisor and office staff." (11 employees in the unit).

0251-80-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union AFL, CIO, CLC (Applicant) v. Pinecrest Manor Nursing Home (Respondent).

Unit: "all employees of Pinecrest Manor Nursing Home in Lucknow, Ontario, save and except professional medical staff, registered nurses, graduate nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, and office staff." (48 employees in the unit). (*Having regard to the agreement of the parties*).

0261-80-R: Canadian Union of Public Employees (Applicant) v. Seaforth Community Hospital (Respondent).

Unit: "all employees of the respondent at Seaforth Community Hospital, Seaforth, Ontario, employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, professional and medical staff, registered and graduate nurses, office, clerical and technical personnel." (14 employees in the unit.) (*Having regard to the agreement of the parties*). (*clarity note*).

0266-80-R: United Cement, Lime and Gypsum Workers International Union AFL, CIO, CLC (Applicant) v. Dunnville Rock Products Limited (Respondent).

Unit: "all employees of the respondent working at or out of the respondent's quarry in Dunnville, Ontario, save and except foremen, persons above the rank of foreman, watchmen and office staff." (16 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0308-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bevan Contracting Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (14 employees in the unit).

0339-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Aztec Contractors Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0360-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. C & M McNally Engineering (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

2253-79-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers: Local No. 304 (Applicant) v. Laura Secord Division Ault Foods Limited Les Aliments Ault Limitee (Respondent) v. Bakery and Confectionary Workers' International Union of America Local 264 (Intervener).

Unit: "all employees at 1500 Birchmount Road, Scarborough, Ontario, save and except supervisors, persons above the rank of supervisor, quality control employees, office staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (666 employees in the unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list		623
Number of persons who cast ballots		623
Number of spoiled ballots		1
Number of ballots marked in favour of applicant	585	
Number of ballots marked in favour of intervener	37	

0024-80-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Winchester District Memorial Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all stationery engineers employed by the respondent at Winchester, Ontario, save and except chief engineers and persons above the rank of chief engineers." (3 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener	0	

Applications Certified Subsequent to Post-Hearing Vote

1780-79-R: Office & Professional Employees International Union (Applicant) v. London District Crippled Children's Centre (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the City of London, Ontario, save and except department heads, those above the rank of department heads, secretary to the executive director, and professionals allied to medicine." (17 employees in the unit).

Number of names of person on list as originally prepared by employer		21
Number of persons who cast ballots		21
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	10	

2299-79-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario as owner and operator of St. Joseph's Hospital, London, Ontario (Respondent) v. Group of Employees (Objectors).

Unit: "all lay employees of the Sisters of St. Joseph of the Diocese of London in Ontario as owner and operator of St. Joseph's Hospital, London, Ontario, employed in the medical laboratories, radiology departments, department of nuclear medicine, respiratory departments, electro-encephalograph departments, electro-cardiograph departments, biomedical repair departments, dental clinics, eye clinics and pulmonary departments at St. Joseph's Hospital, London, as graduate registered technologists, graduate registered technicians, graduate non-registered technologists, graduate non-registered technicians, laboratory assistants, dental assistants, save and except chief technologists and chief technicians, assistant chief technologists and persons above the rank of assistant chief technologist, professional medical staff, physicists, radio pharmacists, chemists, steroid chemists, biochemists and others in position similar to physicists, radio pharmacists, chemists, steroid chemists and biochemists: supervisors, department heads, intravenous therapy nurses, infection control officers, office and clerical staff (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers, librarians and switchboard operators), persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by a subsisting collective agreement between St. Joseph's Hospital and the Ontario Nurses' Association and persons covered by the OLRB certificate dated February 4, 1980 to London and District Service Workers Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C." (126 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on revised voters' list		126
Number of persons who cast ballots	118	
Number of ballots marked in favour of applicant	62	
Number of ballots marked against applicant	55	
Ballots segregated and not counted	1	

2463-79-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL, CIO, CLC (Applicant) v. Sun Parlour Emergency Services Incorporated (Respondent) v. Ontario Ambulance Federation Association, Local No. 3 (Intervener).

Unit: "all employees of the respondent in Leamington, Ontario district, including Tecumseh, Ontario and Woodslee, Ontario, save and except supervisors, persons above the rank of supervisor and office staff." (20 employees in the unit).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots	13	
Number of ballots marked in favour of applicant	13	
Number of ballots marked in favour of intervener	0	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1255-79-R: Canadian Chemical Workers Union (Applicant) v. Somerville Belkin Industries Limited – Brockville Packaging Division (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Brockville, save and except foremen, those above the rank of foreman, office and clerical employees." (148 employees in the unit).

1805-79-R: London and District Service Workers' Union, Local 220 (Applicant) v. Maclean Hunter Communications Division of Maclean-Hunter Cable TV Limited (Respondent) v. Group of Employees (Objectors). (24 employees).

1848-79-R: International Association of Bridge, Structural & Ornamental Iron Workers, Local 765 (Applicant) v. R.E. Harding Limited (Respondent). (4 employees).

2447-79-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Brights Wines Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in its retail stores in Metropolitan Toronto save and except store manager and persons above the rank of store manager, office and clerical employees and salesmen." (16 employees in the unit). (*By agreement of the parties*).

Unit #3: (*See Bargaining Agents Certified – No Vote Conducted*).

2456-79-R: United Food and Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Wellington Mushroom Farm, A Division of Campbell Soup Company Limited (Respondent)
- and -

2457-79-R: United Food and Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Wellington Mushroom Farm, A Division of Campbell Soup Company Limited (Respondent). (149 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

2263-79-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508 (Applicant) v. J.D. Esson Plumbing & Heating Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all plumbers, plumbers' apprentices, steam fitters, steam fitters' apprentices, pipe fitters, pipe fitters' apprentices, gas fitters, gas fitters' apprentices and pipe welders in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	4

2411-79-R: Lumber & Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pluswood Manufacturing Limited (Respondent).

Unit: "all employees engaged in the plant and yard of the company's operations at Atikokan, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, security guards, purchasing agents, quality control engineers, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week". (107 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		107
Number of persons who cast ballots	104	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	93	

2422-79-R: Labourers' International Union of North America, Local 506 (Applicant) v. Metro Concrete Floors Incorporated (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of intervener	8	

0019-80-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Canadian Appliance Manufacturing Company Limited (Respondent).

Unit: "all employees of the respondent at its plant in Orangeville, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff and students involved in an academic program." (188 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		186
Number of persons who cast ballots	168	
Number of ballots marked in favour of applicant	54	
Number of ballots marked against applicant	113	
Ballots segregated and not counted	1	

0023-80-R: Labourers' International Union of North America, Local 506 (Applicant) v. Sealex Waterproof Coatings Limited (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit). (*clarity note*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener	3	

Certification Dismissed Subsequent to Post-Hearing Vote

1979-79-R: Labourers' International Union of North America, Local 527 (Applicant) v. Sanco (1972) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Sanco (1972) Limited working in the building complex composed of the Two Ambassadors and 1435 Prince of Wales Buildings, Ottawa, save and except non-working foremen, persons above the rank of non-working foreman and office staff." (6 employees in the unit).

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5

2152-79-R: United Steelworkers of America (Applicant) v. Surpass Chemicals Limited (Respondent) v. Edward R. Tracey (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and technical staff." (47 employees in the unit).

Number of names of persons on revised voter's list	46
Number of persons who cast ballots	46
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	23
Ballots segregated and not counted	3

2421-79-R: The Ottawa Newspaper Guild, Local 205, The Newspaper Guild (Applicant) v. The Ottawa Journal (Respondent) v. Group of Employees (Objectors).

Unit: "all employees engaged in the Composing Room of the respondent at Ottawa, Ontario, save and except foremen and supervisors and persons above the rank of foreman and supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (25 employees in the unit). (*clarity note*).

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	12

0050-80-R: Ontario Public Service Employees Union (Applicant) v. The Ursuline Religious of the Diocese of London at Glengarda in Windsor (Respondent) v. Group of Employees (Objectors).

Unit: "all lay employees of the respondent, save and except supervisors, persons above the rank and supervisor, office and clerical staff, students employed during the school vacation period and persons employed for not more than 24 hours per week." (35 employees in the unit). (*clarity note*).

Number of persons on list as originally prepared by employer	22
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	14

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1942-79-R: Hotel and Restaurant Employees and Bartenders Union Local 604 AFL, CIO, CLC (Applicant) v. Queens Hotel (Respondent).

2356-79-R: Graduate Assistants Association (Applicant) v. Board of Governors, Ryerson Polytechnical Institute (Respondent).

2429-79-R: Christian Labour Association of Canada (Applicant) v. Perfection Insulations Limited (Respondent) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Intervener).

0059-80-R: London and District Service Workers' Union Local 220 SEIU, AFL, CIO, CLC (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Joseph's Hospital, London, Ontario (Respondent).

0093-80-R: Labourers' International Union of North America, Local 506 (Applicant) v. Gold Structural Limited (Respondent).

0121-80-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Thomas Construction (Galt) Limited (Respondent) v. Ontario Allied Construction Trades Council (Intervener #1) v. Ontario Hydro (Intervener #2) v. The Electrical Power System Construction Association (Intervener #3).

0173-80-R: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Hospital – Hamilton (Respondent).

0184-80-R: Canadian Union of Public Employees (Applicant) v. Lennox & Addington County Board of Education (Respondent).

0208-80-R: Labourers' International Union of North America, Local 506 (Applicant) v. Dantam Investments Limited (Respondent).

0216-80-R: International Brotherhood of Painters and Allied Craftsmen, Local 1891 (Applicant) v. Collavino Incorporated (Respondent).

0220-80-R: Service Employees International Union, Local 183 AFL, CIO, CLC (Applicant) v. Carveth Care Centre Limited (Respondent).

0227-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Malvern Condominium Property Management and/or Malvern Investments Incorporated and/or Peel Condominium Corporation 26 (Respondent).

0265-80-R: Canadian Paperworkers Union (Applicant) v. Quinn Containers Limited, Burlington, Ontario (Respondent).

0272-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Shelter Corporation of Canada Limited (Respondent).

0290-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Arcadia Developments Limited (Respondents).

0295-80-R: United Brotherhood of Steeplejack and Allied Trades of Canada (Applicant) v. H.B. Restoration Company (Respondent).

0317-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Debmar Excavating Limited (Respondent).

APPLICATION UNDER SECTION 4 OF THE SUCCESSOR RIGHTS (CROWN TRANSFERS) ACT, 1977

2000-79-R: Canadian Union of Public Employees and its Local 210 (Applicant) v. The Corporation of the City of Timmins (Respondent) v. Ontario Public Service Employees Union (Intervener). (*Granted*).

APPLICATION UNDER THE EMPLOYEES HEALTH AND SAFETY ACT

0157-78-U: Local 707, UAW, R. Kolborn et al (Complainants) v. Ford Motor Company of Canada Limited (Respondent). (*Withdrawn*).

APPLICATION FOR DECLARATION TERMINATING BARGAINING RIGHTS

1464-79-R: Michael Jones on behalf of himself and other employees of Atlantic Packaging Products Limited (Applicant) v. Printing Specialties & Paper Products Union, Local 701, London, Ontario (Respondent) v. Atlantic Packaging Products Limited (Intervener). (14 employees). (*Withdrawn*).

1679-79-R: Michael E. Jones on behalf of himself and other employees of Atlantic Packaging Products Limited (Applicant) v. Printing Specialties & Paper Products Union Local 701, London, Ontario (Respondent). (14 employees). (*Withdrawn*).

2127-79-R: C. Ray Bowe (Applicant) v. Retail Clerks Union Local 486 Chartered by the Retail Clerks International Union (Respondent) v. Robert Michaud (78) Limited (Intervener).

Unit: "all employees of Robert Michaud (78) Limited in Belleville, save and except the secretary-treasurer and persons above the rank of secretary-treasurer." (4 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer	8
Number of persons who cast ballots	8
Number of ballots marked in favour of the respondent	0
Number of ballots marked against the respondent	8

2314-79-R: Barry Polkinghorne (Applicant) v. Local Union 1687 of the International Brotherhood of Electrical Workers (Respondent) v. M.G. Burke Investments Limited (Intervener). (2 employees). (*Dismissed*).

2464-79-R: Donna Badgley (Applicant) v. Amalgamated Clothing & Textile Workers Union (Respondent) v. Lear Siegler Industries Limited/Delany & Pettit Operations (Intervener). (114 employees). (*Dismissed*).

0076-80-R: Vincenzo De Luc (Applicant) v. International Brotherhood of Electrical Workers (Respondent). (3 employees). (*Granted*).

0077-80-R: Colleen Berak (Applicant) v. Hotel & Restaurant Employees Union, Local 756 (Respondent). (7 employees). (*Dismissed*).

0088-80-R: Vincent Marsh (Applicant) v. Retail Clerks Union, Local 206 (Respondent). (6 employees). (*Granted*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

2380-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Heatex Radiators Limited (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0365-80-U: General Arts Management Incorporated, Agent for "Spring Thaw" (Applicant) v. James Fuller, The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto (Respondent). (*Withdrawn*).

0049-80-U: Gabriel of Canada Limited (Applicant) v. International Association of Machinists and Aerospace Workers and its Local 1295 (Respondents). (*Terminated*).

0383-80-U: Yonge-Ranleigh Investments Limited (Applicant) v. Toronto Building and construction Trades Council, Local 46, Plumbers and Pipefitters, International Brotherhood of Electrical Workers, Local 353, Labourers International Union Local 183, Sheet Metal Workers International Association Local 285, International Union of Operating Engineers Local 793 (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1182-79-U: Joseph William Martin (Complainant) v. General Motors of Canada Limited Respondent. (*Dismissed*).

1190-79-U: Ontario Taxi Association 1688 Canadian Labour Congress (Complainant) v. Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company (Respondent). (*Granted*).

1260-79-U: Canadian Chemical Workers Union (Complainant) v. Somerville Belkin Industries Limited – Brockville Packaging Division, Thomas Frey (Respondents). (*Granted*).

1555-79-U: Joseph Neblett (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Respondent). (*Dismissed*).

1578-79-U: United Food & Commercial Workers International Union (Complainant) v. Sunnylea Foods Limited (Respondent). (*Granted*).

1598-79-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Skinner Bus Lines Limited (Respondent) v. Group of Employees (Objectors). (*Terminated*).

1680-79-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. R.C.A. Limited (Respondent). (*Granted*).

1797-79-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Skinner Bus Lines Limited (Respondent). (*Terminated*).

1810-79-U: Donald Roach (Complainant) v. John Sullivan and the International Union of Operating Engineers Local 796, The Flintkote Company of Canada Limited (Respondents). (*Granted*)

1811-79-U: Donal Roach (Complainant) v. The International Union of Operating Engineers Local 796 and the Flintkote Company of Canada Limited (Respondents). (*Granted*).

1813-79-U: United Steeworkers of America (Complainant) v. Cross Tube Products Incorporated (Respondent). (*Dismissed*).

1817-79-U: Miss Coleen Chiasson (Complainant) v. Caisse Populaire de Cyrville Limitee (Respondent). (*Dismissed*).

1867-79-U: Donal Roach (Complainant) v. The International Union of Operating Engineers Local 796 and The Flintkote Company of Canada Limited (Respondents). (*Granted*).

1904-79-U: United Cement, Lime and Gypsum Workers International Union (Complainant) v. Barry J. Lawrence Management Limited Plastics CMP Limited (Respondents). (*Withdrawn*).

1952-79-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Skinner Bus Lines Limited (Respondent). (*Terminated*).

1985-79-U: International Woodworkers of America (Complainant) v. B & S Furniture Manufacturing Limited (Respondent). (*Granted*).

1986-79-U: International Woodworkers of America (Complainant) v. B & S Furniture Manufacturing Limited (Respondent). (*Dismissed*).

2014-79-M: Vernon A. Bassue (Complainant) v. Local 2900 USWA (Respondent). (*Dismissed*).

2175-79-U: Herman Faria (Complainant) v. Chrysler Canada Limited and UAW Local 1285 (Respondent) v. C. Lewis, Joseph C. Asprey, and Vince Bailey (Intervenors). (*Dismissed*).

2248-79-U: Mieczyslaw (Michael) Zych (Complainant) v. Teamsters Union, Local 879 and Walmer Transport Company Limited (Respondents). (*Dismissed*).

2293-79-U: David Theodore Balint (Complainant) v. Chrysler Canada Limited and UAW Local 444 (Respondents). (*Dismissed*).

2331-79-U: International Woodworkers of America (Complainant) v. B & S Furniture Manufacturing Limited (Respondent). (*Granted*).

2332-79-U: International Woodworkers of America (Complainant) v. B & S Furniture Manufacturing Limited (Respondent). (*Granted*).

2346-79-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Inter City Bandag (Ontario) Limited (Respondent). (*Granted*).

2393-79-U: Canadian Chemical Workers Union and its local 34 (Complainant) v. Bally Refridgeration of Canada Limited (Respondent). (*Withdrawn*).

2417-79-U: United Food and Commercial Workers International Union (Complainant) v. Bright Veal Meat Packers Limited (Respondent). (*Withdrawn*).

2433-79-U: Canadian Paperworkers Union (Complainant) v. Atlantic Packaging Products Limited (Respondent). (*Withdrawn*).

2451-79-U: Elizabeth Nemeth (Complainant) v. Local 1325 Canadian Union of Public Employees (Respondent). (*Dismissed*).

0001-80-U: Ontario Nurses' Association (Complainant) v. Pioneer Manor Home for the Aged (Respondent). (*Withdrawn*).

0010-80-U: United Steelworkers of America (Complainant) v. Bradcon Equipment Limited (Respondent). (*Withdrawn*).

0017-80-U: Toronto Typographical Union 91 (ITU) (Complainant) v. Goldcraft Printers Limited (Respondent). (*Withdrawn*).

0029-80-U: Retail, Wholesale & Department Store Union, Local 414 (Complainant) v. Peoples' Jewelers Limited (Respondent). (*Withdrawn*).

0053-80-U: Ontario Public Service Employees Union (Complainant) v. Town of Midland, Board of Parks Management (Respondent). (*Granted*).

0060-80-U: United Cement, Lime & Gypsum Workers International Union (Complainant) v. Ambler-Courtney Limited (Respondent). (*Withdrawn*).

0062-80-U: Office and Professional Employees International Union (Complainant) v. Retail Clerks Union, Local 206, Chartered by the United Food and Commercial Workers International Union (Respondent). (*Granted*).

0063-80-U: United Brotherhood of Carpenters and Joiners of America, AFL, CIO, CLC (Complainant) v. Canadian Woodwork Manufacturers' Association (Respondent). (*Withdrawn*).

0067-80-U: Mr. Nik Habermel (Complainant) v. Trans Nation Incorporated (Respondent). (*Granted*).

0078-80-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Complainant) v. Stewart-Warner Corporation of Canada Limited (Respondent). (*Withdrawn*).

0094-80-U: Office and Professional Employees International Union, Local 343 (Complainant) v. Ontario Teamsters Credit Union Limited (Respondent). (*Withdrawn*).

0098-80-U: United Cement, Lime & Gypsum Workers International Union (Complainant) v. Par-Tex Engineering & Contracting Company Limited (Respondent). (*Withdrawn*).

0107-80-U: United Food and Commercial Workers International Union, AFL, CIO, CLC (Complainant) v. Wellington Mushroom Farm, A Division of Campbell Soup Company Limited (Respondent). (*Withdrawn*).

0109-80-U: United Steelworkers of America (Complainant) v. Bradcon Equipment Limited (Respondent). (*Withdrawn*).

0111-80-U: John Holroyd (Complainant) v. W.O.K. Mechanical Enterprises Limited carrying on business as Berkeley and Trans-Nation Inc. (Respondents). (*Withdrawn*).

0114-80-U: Millworkers Local 802 – United Brotherhood of Carpenters and Joiners of America (Complainant) v. Square 'H' Woodwork Limited (Respondent). (*Withdrawn*).

0149-80-U: International Molders & Allied Workers Union (Complainant) v. Southern Wood Products Limited (Respondent). (*Withdrawn*).

0151-80-U: Ontario Public Service Employees Union (Complainant) v. Fleetwood Ambulance Limited (Respondent). (*Withdrawn*).

0171-80-U: Laurentian University Support Staff (Complainant) v. Laurentian University of Sudbury (Respondent). (*Withdrawn*).

0179-80-U: United Food and Commercial Workers International Union (Complainant) v. Tilden Rent-A-Car (Toronto International Airport) (Respondent). (*Withdrawn*).

0180-80-U: Interior Systems Contractors Association of Ontario (Complainant) v. International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Respondent). (*Withdrawn*).

0181-80-U: Interior Systems Contractors Association of Ontario (Complainant) v. Acoustical Association of Ontario (Respondent). (*Withdrawn*).

0202-80-U: Canadian Union of Operating Engineers & General Workers (Complainant) v. Queensway-Carleton Hospital (Respondent). (*Withdrawn*).

0203-80-U: Canadian Union of Operating Engineers & General Workers (Complainant) v. Queensway-Carleton Hospital (Respondent). (*Withdrawn*).

0204-80-U: Canadian Union of Operating Engineers & General Workers (Complainant) v. Campeau Corporation (Respondent). (*Withdrawn*).

0241-80-U: Ontario Public Service Employees Union (Complainant) v. The Oakville Association for the Mentally Retarded (Respondent). (*Withdrawn*).

0244-80-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Complainant) v. Rexdale Plastics Limited (Respondent). (*Withdrawn*).

0253-80-U: Larry Hutchison (Complainant) v. National Council of Canadian Labour Union (Local 207) (Respondent). (*Withdrawn*).

0283-80-U: Christian Labour Association of Canada (Complainant) v. International Brotherhood of Painters and Allied Trades Local 205 (Respondent). (*Withdrawn*).

0289-80-U: Ontario Public Service Employees Union (Complainant) v. Fleetwood Ambulance Limited (Respondent). (*Withdrawn*).

0303-80-U: Service Employees' Union, Local 183 (Complainant) v. Carveth Care Centre (Respondent). (*Withdrawn*).

0306-80-U: United Brotherhood of Carpenters and Joiners of America, AFL, CIO, CLC, Local 2679 (Complainant) v. Canadian Woodwork Manufacturers' Association (Respondent). (*Withdrawn*).

0323-80-U: Ontario Public Service Employees Union (Complainant) v. Fleetwood Ambulance Services (Respondent). (*Withdrawn*).

0324-80-U: Canadian Union of Public Employees (Complainant) v. ABC Nursery and Kindergarten Limited (Respondent). (*Withdrawn*).

0330-80-U: Kevin Jackson (Complainant) v. Oil, Chemical & Atomic Workers International Union Local 9-670, Brian Hayes, George Thompson and Brian Brophy (Respondents). (*Withdrawn*).

APPLICATION UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0178-80-OH: Kenneth Thomas Robertson (Complainant) v. Mr. Mike Ciric and Furlong Plastics (Respondents). (*Withdrawn*).

APPLICATION FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0132-80-M: United Rubber, Cork, Linoleum and Plastic Workers of America, Local 723 (Trade Union) v. Viceroy Fluid Power Limited (Employer). (*Granted*).

APPLICATIONS UNDER SECTION 55

2333-79-R: Retail Clerks Union, Local 486 (Applicant) v. Steve Duga, carrying on business as Otto's Delicatessen (Respondent) v. Group of Employees (Objectors). (*Granted*).

0038-80-R: Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders International Union; AFL, CIO, CLC and Windsor and District Labour Council (Applicant) v. Sahara Inn (Respondent). (*Granted*).

APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 78

2278-79-U: Local 556, Ontario Public Service Employees Union and Edward G. Theobald (Complainants) v. Ontario Public Service Employees Union (Respondent) v. Ontario Council of Regents for Colleges of Applied Arts and Technology (Intervener). (*Withdrawn*).

JURISDICTIONAL DISPUTE

0305-80-JD: Watts & Henderson Limited (Complainant) v. International Union of Operating Engineers, Local 793 (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1191-79-M: London District Service Workers Union, Local 220 (Trade Union) v. Norfolk Hospital Nursing Home (Employer). (*Granted*).

1629-79-M: Canadian Union of Public Employees, Local 2026 (Applicant) v. The Dufferin-Peel Roman Catholic Separate School Board (Respondent). (*Dismissed*).

2394-79-M: London and District Service Workers' Union Local 220 (Applicant) v. McCormick Home (Women's Christian Association of London) (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 112(a)

0451-79-M: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 67 (Applicants) v. The Mechanical Contractors Association of Ontario and Sheaffer-Townsend Construction Limited (Respondents). (*Granted*).

0557-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. The Tatham Company Limited and Magnus Construction Limited (Respondent). (*Withdrawn*).

0579-79-M: International Association of Bridge Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Lincoln Ironworks Co. Ltd. (Respondent). (*Granted*).

0870-79-M: A Council of Trade Unions acting as agent for Teamster Local 230 and LIUNA Local 183 (Applicant) v. Metropolitan Toronto Road Builders Association and Repac Construction and Materials Ltd. (Respondents). (*Dismissed*).

0904-79-M: A Council of Trade Unions, acting as the representative and agent of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 230 and Labourers' International Union of North America Local 183; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local 230 and Labourers' International Union of North America, Local 183 (Applicant) v. The Metropolitan Toronto Road Builders' Association and Bramall and Co. Construction Ltd. (Respondents). (*Withdrawn*).

0956-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Donald A. Foley Ltd. and Maceron Construction and 429185 Ontario Limited carrying on business as Kingston Aggregates (Respondents). (*Granted*).

0996-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Donald A. Foley Ltd. and Maceron Construction and 429185 Ontario Limited carrying on business as Kingston Aggregates (Respondents). (*Granted*).

0997-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Donald A. Foley Ltd. and Maceron Construction and 429185 Ontario Limited carrying on business as Kingston Aggregates (Respondents). (*Granted*).

1067-79-M: Toronto Building and Construction Trades Council on its own behalf and on behalf of the United Brotherhood of Carpenters and Joiners of America Local Union 1190 (Applicant) v. Randa Developments Ltd. (Tridel) and the Metropolitan Toronto Apartment Builders Association (Respondent). (*Withdrawn*).

1247-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Norman Clancy Displays (Respondent). (*Withdrawn*).

1669-79-M: Ontario Provincial Conference of Bricklayers Local No. 12 Kitchener, Ontario (Applicant) v. Lavern Asmussen Ltd. (Respondent). (*Granted*).

1880-79-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Per-fec-tion Insulations Limited and R.N. Flynn Insulations Ltd. (Respondents). (*Granted*).

2390-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508 (Applicant) v. B. & H. Mechanical (Respondent). (*Granted*).

2428-79-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Olympia Masonry Limited (Respondent). (*Granted*).

0106-80-M: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Norm's Erection Service, the Association of Millwrighting Contractors of Ontario (Respondents). (*Withdrawn*).

0112-80-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Jackson-Lewis Company Limited (Respondent). (*Withdrawn*).

0113-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. Whitehall Development Corporation Ltd. (Respondent). (*Withdrawn*).

0142-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. Beton Concrete Forming Ltd. 100 Milford-Haven Dr. Scarborough, Ontario M1G 3R1 (Respondent). (*Withdrawn*).

0152-80-M: Labourers' International Union of North America Local 183 (Applicant) v. Six Stars Construction Company Limited (Respondent). (*Granted*).

0160-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 494 (Applicant) v. Silla Holdings Limited (Respondent). (*Withdrawn*).

0162-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Zorko Plumbing Co. and Metropolitan Plumbing & Heating Contractors Association, A Division of the Mechanical Contractors Association Toronto (Respondents). (*Withdrawn*).

0168-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 494 (Applicant) v. Robert Village Limited (Respondent). (*Withdrawn*).

0169-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 494 (Applicant) v. Roko Construction Limited (Respondent). (*Withdrawn*).

0190-80-M: Labourers' International Union of North America, Local 247 (Applicant) v. Donald A. Foley Ltd. and Maceron Ltd. and 429185 Ontario Ltd. carrying on business as Kingston Aggregates (Respondent). (*Granted*).

0191-80-M: International Union of Operating Engineers Local 793 (Applicant) v. Donald A. Foley Ltd. and Maceron Construction and 429185 Ontario Ltd. carrying on business as Kingston Aggregates (Respondents). (*Granted*).

0255-80-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Norman Clancy Displays (Respondent). (*Withdrawn*).

0270-80-M: Marble, Tile & Terrazzo Union, Local 31 (Applicant), v. Bloor Terrazzo, Tile & Mosaic Limited (Respondent). (*Withdrawn*).

0284-80-M: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Tilechem Limited (Respondent). (*Granted*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1967-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. Duron Ottawa Ltd., (Respondent) v. Operative Plasterers and Cement Masons' International Association of the United States and Canada, Local Union 124, Ottawa-Hull (Intervener). (*Sections 1(4), 55*). (*Request Denied*).

2100-78-R: Labourers' International Union of North America, Local 506 (Applicant) v. Exhibition Stadium Corporation (Respondent). (*Certified*). (*Request Denied*).

0680-79-R: Association of Allied Health Professionals, Ontario (Applicant) v. Victorian Order of Nurses, London St. Thomas Branch (Respondent) v. Canadian Union of Public Employees (Intervener). (*Certified*). (*Request Denied*).

0975-79-R: Ontario Public Service Employees Union (Applicant) v. Hawkesbury and District General Hospital (Respondent) v. The Canadian Union of Public Employees (Intervener). (*Certified*). (*Request Denied*).

1180-79-R: Graphic Arts International Union Local 12-L, (Applicant) v. Ronalds Printing, A Division of Ronalds-Federated Limited (Respondent). (*Certification*). (*Request Denied*).

1207-79-U: International Molders & Allied Workers Union (Complainant) v. Rehau Plastics of Canada Limited (Respondent). (*Section 79*). (*Request Denied*).

1339-79-R: The Hotel & Club Employees' Union Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union (AFL, CIO, CLC) (Applicant) v. Monarch Steakhouse Restaurant and Tavern (Respondent). (*Certified*). (*Request Denied*).

2284-79-R: Canadian Union of Public Employees (Applicant) v. Ottawa-Carleton Regional Residential Treatment Centre (Respondent) v. Group of Employees (Objectors). (*Certified*). (*Request Denied*).



Ontario
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**A Monthly Series of Decisions from the
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2124-79-OH Albert Gedraitis, Complainant, v. Adelaide Building Services, Respondent.

Health and Safety – Employee alleging discipline for seeking enforcement of Occupational Health and Safety Act – Reporting complaints to employer’s client and not to employer – Never raising matter directly with employer

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members E. J. Brady and S. H. Lewis.

APPEARANCES: *H. Kopyto for the complainant; R. C. Filion, D. Hogg, R. Davis and B. Smeenk for the respondent.*

DECISION OF THE BOARD; July 23, 1980

1. The name of the respondent is amended to read: “Adelaide Building Services”.
2. The complainant has complained that he has been dealt with by the respondent contrary to the provisions of section 24(1) of *The Occupational Health and Safety Act, 1978* (hereinafter referred to as “the Act”), and requests that the appropriate relief be given by the Board.
3. The complaint does not allege that the complainant was discharged because of any refusal to work where his health or safety was in danger. The operative part of the complaint is set out below:

“On or about January 5, 1980 the grievor was dealt with by Roy Vasconcelos and Rick Davis of the respondent contrary to the provisions of section 24(1) of *The Occupational Health and Safety Act, 1978* in that he did on his own behalf or on behalf of the respondent dismiss the complainant and grievor from his employment as check-up man because he:

... in December 1979 reported to his supervisor, among other things, the fact that the electrical cables on the vacuum machines had not been replaced for a two month period and were in a state of disrepair to such an extent that they constituted a hazard.

On Wednesday, January 2, 1980, the complainant further informed two supervisors of the respondent company concerning the situation mentioned in the above paragraph.

Further, the complainant states that on the 3rd day of January, 1980, he made a notation in the hydro log book for his fellow employees that he was preparing a comprehensive study and recommendations under *The Occupational Health and Safety Act* for submission to his employer-respondent.

The complainant alleges that his dismissal from the respondent company constituted wrongful discipline. The complainant alleges that his dismissal resulted from his actions in compliance with *The Occupational*

Health and Safety Act, 1978, and his attempts to have the act enforced."

4. At the commencement of the hearing, counsel for the respondent argued that the complaint did not on its face disclose a violation of section 24(1) of the Act. Counsel pointed out that there was no allegation that an order had been refused for health or safety reasons, or that the complainant sought enforcement of the Act or its regulations. After hearing the submissions of both counsel on this point, the Board reserved determination of this matter, and, with the consent of counsel, proceeded to hear the evidence.

5. Section 24(1) of The Act reads as follows:

"No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act of the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations."

That provision does not, on its face, limit its protection or application to situations where a worker has refused to perform work. The Act itself speaks to matters other than refusal, and, among other things, imposes a variety of obligations upon constructors, employers, supervisors, workers, owners and suppliers (see Part III of the Act). A worker who is trying to comply with the provisions of this Act by fulfilling his obligations under section 17, or who is trying to seek enforcement of this Act by getting his employer or supervisor to fulfill the obligations set out in sections 14, 15 and 16 of the Act, is no less entitled to the protection of section 24(1) than is the person who refuses to perform work. Therefore, the Board finds that the complaint on its face does allege matters which may constitute a violation of section 24(1), insofar as they are capable of being included in sections 14, 15, 16 and 17, and that it has jurisdiction to hear the matter.

6. The complainant was first employed by the respondent in May 1978. He worked for the respondent in various locations, including the IBM building and Hydro Place, until he resigned sometime in July 1979 to go to San Francisco. In August 1979 he was re-employed by the respondent and sent to work at Hydro Place as a check-up man. He was employed there in that capacity until his discharge in January, 1980. The respondent is in the business of providing cleaning services on a contract basis. At all material times, it was under contract to provide cleaning services to Canada Square, the owner of the building commonly known as Hydro Place, whose primary tenant at that location is Ontario Hydro.

7. In December 1978, while employed by the respondent as a cleaner in the IBM building, the complainant wrote a rather long (four legal-sized sheets) letter to Mr. Havarty, who was at all material times the building services co-ordinator at IBM. The latter turned the letter over to Mr. Rick Davis, the respondent's quality control officer. The contents of the letter are

not material, except to the extent that it contains criticisms and complaints made against the respondent by one of its employees directly to one of the respondent's clients. It is reasonable to conclude that the respondent would, at the very least, be embarrassed by such a communication. Mr. Davis testified that, when he was given the letter, he saw the complainant and told him that he should be "fired on the spot" for what he had done. Mr. Davis said that rather than discharge the complainant, he decided to work with him that night and ensure that the complainant was properly trained to handle the job. He also testified that he made it clear to the complainant that if he wrote anything like that letter to a customer again, he would be fired. Mr. Davis explained that the cleaning business is very competitive, and customers change cleaners very frequently; because of this, the respondent is very sensitive to anything which could diminish it in the eyes of one of its clients. He also explained that the respondent has difficulty recruiting personnel with an adequate working knowledge of English, and that the complainant was valuable to and valued by the respondent because of his facility with the language.

8. The complainant confirmed that Mr. Davis made it clear to him that writing the letter to the client was a very serious matter. He acknowledged that it was made clear to him that such communications embarrassed the respondent, and that he was not to communicate with any of the clients again in such a manner. The only significant difference between the complainant and Mr. Davis was the former's denial that he had been threatened with dismissal if anything like that recurred. There can be no doubt, though, that the complainant was made aware of the seriousness with which the respondent viewed his actions, and it seems only reasonable to accept that he could conclude that the respondent's attitude toward any subsequent action of that sort would be equally censorious, at the very least.

9. In July 1979 Mr. Davis wrote a letter of recommendation for the complainant. That letter, addressed "To Whom It May Concern" describes the complainant as a "dedicated and conscientious employee" and gives him "our highest recommendation". At the time the letter was written neither Mr. Davis nor the complainant contemplated that the complainant would be returning to Toronto again. The complainant did return and was hired by the respondent in August 1979. Mr. Davis admitted that he might have been too exuberant in his praise of the complainant, but it seems clear that the complainant performed his work in a satisfactory manner, and the only real cause of complaint the respondent had was his letter to its client. The fact that the complainant was re-hired in August 1979 essentially confirms it.

10. Mr. Davis testified that there are approximately 48 people employed by the respondent at Hydro Place. There is supervision on the site, and there is also a travelling supervisor, Mr. John Pimpao, who has authority over several buildings, including Hydro Place. The complainant was sent to Hydro Place as a check-up man in August 1979 and held that position continuously until his discharge. Essentially, his job was to follow the cleaning crew into an area and see that everything was done properly. If things were not done properly, he was to do them himself or report it to the foreman. Part of his job was to ensure that any poorly-done cleaning jobs brought to the respondent's attention as a result of periodic inspection tours were attended to.

11. Mr. Davis said that sometime in September 1979, he began getting complaints from Mr. Pimpao about the complainant's performance. He said that these complaints were received regularly and were recurring, and that he told Mr. Pimpao to try to handle the situation. By December 1979 Mr. Pimpao apparently was calling Mr. Davis at home with complaints about the complainant's work performance. Sometime in December (Mr. Davis be-

lieved it was Monday, December 17, 1979), the complainant arrived at the respondent's office at 11:00 a.m. to see Mr. Davis. Mr. Davis said that, at the time, he believed that the complainant had come on his own initiative, but was later informed that Mr. Pimpao had sent the complainant. In any event, Mr. Davis met with the complainant. Mr. Davis testified that the complainant had with him a "list of complaints" about the job and that he did not really elaborate on any of the points contained in the list. Mr. Davis said that at no time did the complainant mention anything about the state of the electrical cables on the vacuum cleaners, safety, or safety hazards at the workplace. According to Mr. Davis, he asked no questions of the complainant, and the meeting ended with him promising the complainant that they would meet again after Christmas. Mr. Davis said he later showed the list to both Mr. Pimpao and Mr. Monds, the manager of quality control.

12. The complainant testified that for some time prior to this meeting, he had been concerned about safety. In particular, his concerns seemed to centre around the electrical cables on the vacuum cleaners and the long hours some employees were agreeing to work. From his testimony it would appear that at the heart of the first concern was the complainant's view that there were cords with "exposed and raw wire" being used nightly, and that the respondent in general, and Mr. Pimpao in particular, was not keeping abreast of the situation by replacing these cords. The complainant said that before meeting with Mr. Davis, he had talked to Mr. Pimpao about the electrical cables on a number of occasions, but did not pursue the matter. According to the complainant, he decided on his own in December to go to see Mr. Davis to discuss the problems he was having with Mr. Pimpao. He recalled the meeting as being earlier than December 17th, but could not give an exact date.

13. The complainant said that prior to meeting with Mr. Davis he went to a restaurant across the street from the respondent's offices and drafted the list referred to earlier. He said that at 11:00 a.m. he met with Mr. Davis and handed over the list. The complainant said that he went over the list with Mr. Davis and, although he admitted that the word "safety" was not mentioned, he testified that he regarded safety as being the underlying theme of the discussion. Essentially, the complainant and Mr. Davis gave the same account of that meeting.

14. The list which the complainant gave to Mr. Davis is reproduced below:

- "1. The English copy of the complaints doesn't arrive by 10:00 p.m.
2. Sometimes the 2nd and 3rd complaint on a given task is the first one we see.
3. Sometimes the English is mis-read in Portuguese over the phone to Edmond [the foreman on site]; & not until the English arrives & I compare the 2 do we find a floor number has been mis-read as a location or vice versa. Or a significant word in the English has been dropped.
4. The service we get from the office is lousy: a. *Materials* – urgent calls for materials go unanswered for days; b. *Manpower* – workers are constantly pulled out of the building, hours extended to 12, absenteeism is generated, & we never get replacements; c. *Machine Repairs* – several of our machines are usually semi-functional – weak

suck – Edmund keeps them as well prepared as possible but only a total breakdown of the machine seems to merit the attention of the office.

5. *Disruption of Scheduling:* Visits from supers on peak days (especially Tues. & Weds.) or peak hours (especially Midnight to 4) divert the Forepeople. I refuse to sit down & almost refuse to participate in 4-person inspection because of bad timing of the visit.”

Without for the moment discussing the safety situation at the workplace or the complainant's concerns as expressed in paragraph 12 of this decision, it is reasonable to conclude that anyone reading the above list would not conclude that either safety or safety hazards at the workplace was the subject matter of any of the complaints. Therefore, if safety was indeed uppermost in the complainant's mind, it is not obvious from the list he drafted. Even accepting the complainant's account of the discussion he had with Mr. Davis about the list, it is still virtually impossible to conclude that a reasonable person in Mr. Davis' position would conclude that he was being talked to about safety. There is in fact nothing in either the list or the account of the discussion to lead anyone to any other conclusion than that the complainant was making very general complaints about his work situation and about Mr. Pimpao's competence as a supervisor. This appears to be exactly what Mr. Davis determined after his December meeting with the complainant.

15. The next meeting that Mr. Davis had with the complainant occurred on January 2, 1980. At that time Mr. Monds also attended. This meeting was called at the initiative of Mr. Davis who sent a note to Hydro Place to have the complainant attend at the respondent's office. The thrust of the accounts given by both Mr. Davis and Mr. Monds was that they wanted to discuss the situation at Hydro Place, to let the complainant know what they expected of him, and to try to tell him why there were problems there. In particular, both of them stressed that the complainant was specifically instructed about the chain of command and the channels of communication which he should follow. Mr. Davis said that they did not discuss the complainant's list of complaints because they did not want him either to get angry or to feel threatened. It would appear, though, that they attempted to get the complainant's views on whether the employees were satisfied with their latest raise, and that the question of transferring the complainant to another building was discussed. According to Mr. Davis, both he and Mr. Monds still hoped that the complainant could be a good employee in another setting. Both Mr. Davis and Mr. Monds were certain that the complainant did not discuss safety, electrical cables, or any other safety issue.

16. The complainant's account is somewhat different. He testified that he began the discussion by dealing with the first issue which he had raised on his list, but that he was interrupted by Mr. Monds who questioned him about a dispute concerning the way the employees were paid for New Year's Eve. The complainant asserted that he discussed both soap and cables at the meeting. He said that in relation to cables, he told them that he asked about cables every night, that he “tried” to say that there was no regular supply of cables from the office, that when the foreman received cable he would repair the machines as they required it, and that there would be times when the cables were not in good condition, but that Mr. Pimpao did not respond to the situation. The complainant agreed that he did not use the word “safety” in connection with any of his remarks.

17. If the Board accepts the complainant's evidence that cables were discussed, it seems odd that he would discuss such a subject in conjunction with soap. A connection between the two commodities is only obvious if they were discussed as part of a general complaint about Mr. Pimpao's performance in ensuring that the site was receiving necessary supplies. It would not be unreasonable, therefore, to conclude that the emphasis was again placed on Mr. Pimpao's deficiencies as a supervisor rather than on any potential safety hazard. The Board does not accept that the complainant raised these issues with the respondent on January 2, 1980; it is more probable that, in view of the complaints received about the complainant, he was brought into the office that day to be specifically instructed in the manner in which he should conduct himself in the future.

18. Mr. Davis testified that on January 3, 1980 he talked to Mr. Pimpao to see if the complainant was doing what they had asked of him. He said that the information he received was to the effect that the complainant had not done what he was requested to do, and that he had complained about the pressure tactics used on him by Messrs. Davis and Monds. This was largely confirmed by the complainant, who did acknowledge that he felt somewhat threatened or intimidated by the encounter – or, more specifically, by spatial relationship of the other two men to him. The Board does not accept that the complainant was consciously threatened or pressured by either Mr. Davis or Mr. Monds; however, it would appear consistent with the conclusions already reached about the meeting that the complainant would have left with some sort of perception that the respondent was not taking his side in any conflict with Mr. Pimpao. To that extent, and to that extent alone, it may be possible to conclude that the complainant felt threatened. As a result of his conversation with Mr. Pimpao, Mr. Davis left word to have the complainant call him the next day. The complainant never called Mr. Davis.

19. On January 3, 1980 the complainant arrived at work wearing around his neck a copy of an article taken from that morning's *Globe and Mail* entitled "Employers told not to retaliate against union activities". The article contains an account of the Board's decision in *Oil, Chemical and Atomic Workers International Union v. Wyeth Ltd.*, [1979] OLRB Rep. Dec. 1311. That case had nothing whatsoever to do with safety; the article had nothing to do with safety. The complainant said he wore the article to work and then left it hanging around the coat tree in the office because he wanted the employees to know there was some job security.

20. The great majority of the employees, according to all of the evidence, had only a rudimentary knowledge of English and many knew no English at all. How the complainant expected to convey his message about job security to his audience in this manner is hard to imagine.

21. The complainant also testified that on January 2nd there had been a problem with one of the cords on a vacuum cleaner, and that by January 3rd his concern had prompted him to find a way "to bring the problem to the attention" of the respondent and to get around Mr. Pimpao's failure to communicate these matters to the respondent. It seems that even the complainant was uncertain that he had brought the alleged safety hazards to the attention of the respondent in the two meetings where he claimed to have discussed his concerns about safety. In any event, the complainant wrote the following message in the log book kept by the security guards for recording all after-hour movement to and from the building:

“OFFICIAL NOTICE

My work in this Building is not yet finished as I am preparing a comprehensive study & recommendations to fulfill my obligations under the *Occupational Health & Safety Act 1978* for submission to Adelaide, Hydro, Canada Square & the Ontario Ministry of Labour.

Albert Gedraitis”

There was no supervisor in the building that night, and the notice did not come to the attention of any representative of management.

22. On January 4th the complainant arrived at work and signed the security guard’s log book for the building. Around 9:00 p.m. he returned to the security guard’s desk and waited for Mr. Pimpao and Mr. Vasconcelos (another supervisor) to arrive. When they arrived, the complainant wrote out a copy of the notice, read it aloud, and asked the security guard to bear witness to the encounter. He said that the two supervisors asked him to accompany them to the office and then proceeded to question him about his January 2nd meeting with Messrs. Davis and Monds. He said that he told them that he had been “grilled and cross-examined” at the January 2nd meeting, and that he told Mr. Pimpao that along with his safety report, he was also going to take action to see past wrongs (such as missed overtime opportunities) against him were also righted. Messrs. Pimpao and Vasconcelos left and the complainant returned to work.

23. Mr. Davis said that at 10:00 p.m. on January 4th he was telephoned at home by Mr. Vasconcelos. The latter told him that he had gone to Hydro Place at Mr. Pimpao’s request to assist Mr. Pimpao in investigating a report that the complainant had written some sort of official notice in the Hydro log book. Mr. Davis testified that his immediate reaction was that he had told the complainant not to write anything to the customers without coming to the respondent first at the time of the IBM incident, and that the complainant had gone ahead and done it again. He said that he was not told what the notice said, and that such knowledge would not have affected his decision at all. At that time he decided to discharge the complainant and instructed Mr. Vasconcelos to “get him out of the building”. He also told Mr. Vasconcelos that he would be in the office on Saturday if the complainant wanted to talk to him.

24. Sometime between 12:30 and 12:45 a.m. on January 5th the complainant was discharged by Mr. Vasconcelos in the presence of Mr. Pimpao and the security guard. Mr. Vasconcelos told the complainant that he was discharged and, when asked by the complainant for reasons, said that he would have to call Mr. Davis. The complainant also said that, when told he was fired, he said to the two supervisors, “You are in violation of the *Occupational Health and Safety Act*” but they ignored him. The complainant was present when Mr. Vasconcelos used the telephone and heard him say, “Albert wants a reason for being fired”. Mr. Vasconcelos then told the complainant that his work was unsatisfactory, but the complainant derided that reason and challenged Mr. Vasconcelos to do better. Mr. Vasconcelos then repeated the complainant’s words over the telephone; he did not, however, mention the Act at any time

during his telephone conversation. The complainant was then told reasons by Mr. Vasconcelos; those reasons were then given to the complainant in writing and he left the premises.

25. Mr. Davis testified that he was asleep when Mr. Vasconcelos telephoned him after midnight. Mr. Davis said he was informed that the complainant would not leave without a written notice of termination so he dictated reasons to Mr. Vasconcelos. He acknowledged that the notice given to the complainant was dictated by him to Mr. Vasconcelos. He said that while talking to Mr. Vasconcelos, he could hear shouting in the background, and the reasons contained in the notice were given after having been awakened from sleep. The note given to the complainant is reproduced below:

“To Albert Gedraitis

As of Jan. 5 1980 at 12:45 a.m. you are fired from Adelaide Main.

Reasons Given:

Unco-operative and unwilling to accept direction [sic] from supervision as said by Mr. Rick Davis Operations Manager.

Roy Vasconcelos”

26. Later that day Mr. Davis saw the notice written by the complainant in the log book. He said that when he saw it, he thought that it might give Ontario Hydro the wrong impression of the respondent's safety methods and equipment. He said that up to the time he saw the notice he was unaware of any safety complaint made by the complainant. Mr. Davis said that, in any event, the client's log book was not an acceptable method of communicating with the respondent. The complainant himself admitted that, when he wrote the notice, he knew that the respondent would take offence at the manner of communication he had chosen.

27. In order to put the matter in context and to assess the situation, it is necessary to examine the safety situation insofar as it concerns the respondent and its employees. The respondent has prepared a booklet entitled “Personnel Policy Manual”. The booklet is thirteen pages long and does deal in a very general way with safety matters. For example, it instructs employees to tell their supervisors of anything on the job that is potentially dangerous and might cause injury. Mr. Monds testified that each new employee should be given a copy of the booklet and that a copy should be posted at each site. The complainant said that he had never been given such a booklet, and had never seen a copy of it posted at Hydro Place. The respondent's evidence falls short of establishing that the booklet was in fact distributed. Moreover, even if it was distributed, given the evidence about the composition of the work force, it is highly unlikely that the booklet would be intelligible to the majority of employees. Therefore, while the booklet indicates that the respondent's intentions were to inform employees about safety, among other things, its execution falls short of carrying out this intention in a meaningful way.

28. The respondent's evidence was that, leaving aside incidents where employees may have suffered minor injuries (such as back strains or cuts), there were only two incidents which occurred at Hydro Place and which were brought to its attention. One was an occasion when an employee was overcome by fumes from a chemical used in a photocopier. That chemical

had been improperly disposed of by someone unconnected with the respondent. The other was an incident where a cord on one of the respondent's vacuum cleaners was cut when it was found to be unsafe. The complainant in his testimony itemized several incidents dealing with fumes, chemicals, faulty electrical cables, etc. In response to a subpoena, Ontario Hydro produced eight documents dealing with safety incidents which the complainant introduced to substantiate his evidence. The Board has examined those documents and, as a result of that examination, the obvious conclusion is that the credibility of the respondent's evidence is not seriously diminished by those documents. Most of the documents deal with chemicals and none of those were addressed to or distributed to any of the respondent's personnel. As a matter of fact, one memo dated October 1, 1979 seems to confirm the respondent's evidence that there was one incident where an employee fainted because of fumes. None of the documents dealing with chemicals suggest that these chemicals belonged to or were used by the respondent in its cleaning operation. The memos also suggest that the problem was not being ignored by those responsible.

29. There are two documents which deal with electrical cords on the respondent's vacuum cleaners. The first, dated August 24, 1979, is reproduced below:

"Memo To	MR. PAUL STREET	August 24, 1979
	Foreman- Cleaning Services	
	Building and Office Facilities	
Dept	M010	
Subject	<i>Cutting of faulty cable on Adelaide Vacuum</i>	

Messrs. Chaplin and Monds have contacted me today regarding last night's incident. As I understand, you have cut a badly damaged cable on an Adelaide Co. vacuum in order to stop the staff from using this particular piece of equipment.

I backed up your prompt decision, and told both men that you had to act when your complaints and warnings were ignored. I also told them that it is your duty to protect the life of anyone working on Hydro premises [sic] and property belonging to Hydro. A cable without insulation can cause accidents or fires.

However, should you encounter similar safety hazards in the future, please do not touch the equipment, but have it impounded by the Security Officer on duty.

R. Beran
Supervisor Cleaning Services
Building and Office Facilities"

The respondent's evidence about an incident when the cable on one of its machines was cut referred to this incident.

30. The Board also heard evidence from Mr. John Guarisco, the shift superintendent

for building security at Hydro Place. He was the author of one of the reports put before the Board. That report is reproduced below:

“Time: 16:10 hours
Area: Main Floor

Date: 80-05-08
Bldg: 620 University Avenue

On the above time and date, Mr. Albert Gedraits [sic] (phone 368-9150) an ex-Adelaide supervisor who is currently in court with a law suit against Adelaide Cleaning Company, approached the writer at the 620 security desk and asked if I could appear in court on his behalf in regards to an incident that occurred around January 24-30, 1980 on the midnight shift. Mr. A. Gedraits stated that if I didn't come voluntarily he would subpoena me to go to court on June 3, 1980 at 400 University Avenue on the 6th floor. The following is a detailed account of the January 24-30, 1980, incident. While stationed at the Control Centre Mr. John Duarte, a cleaner, plugged his vacuum cleaner at the Control Centre outlet and in doing so sparks and smoke emitted [sic] from the outlet. The writer at once pulled the cord out of the outlet and refused the cleaner to use the machine until it gets repaired. A check was done and four more vacuum cleaners (cords) were found to be unsafe. Mr. Edmond Correia, foreman, was informed about the incident and was told that the machine wouldn't be released to him until the cords were replaced on all machines that needed to be repaired.

Mr. E. Correia went to his Head Office and came back with new cords for all the vacuum cleaners. The cords for five machines were all replaced by the next day.

J. Guarisco
Shift Supervisor
Head Office Building Security”

Mr. Guarisco said that he could not recall when the incident occurred, but that he was certain that the complainant was not present when the incident occurred and did not accompany him on any inspection tour to examine other vacuum cleaners. The complainant claimed that this occurred on January 2nd and that he accompanied Mr. Guarisco on his tour. In view of Mr. Guarisco's account of events, it is difficult to accept that this incident occurred before the complainant's discharge, or that he had any knowledge of it when he wrote his “official notice” in the log book.

31. There was a great deal of evidence given about the respondent's inspection of its electrical cables, and the supply of those cables for replacement. In view of all of the evidence presented, it is not possible to conclude that the respondent was unconcerned with safety or unaware of the importance of ensuring the electrical cables were in good condition. The situations described in the testimony of Mr. Guarisco and in the memo of August 24, 1979, do suggest, though, that there were cases where problems with electrical cables were not attended to until brought to the respondent's attention by someone else. While this does not wholly confirm the complainant's assertion that there were always frayed cables on the vacuum cleaners, it should give some cause for concern by the respondent that the equipment was not always

being properly inspected or cared for by its employees and supervisors. In all candour, the only real potential safety hazard wholly within the control of the respondent to which the Board was directed was the electrical cable situation. The evidence falls far short of allowing the Board to conclude that there was indeed a safety hazard at any material time; but the evidence is such that it can be concluded that the respondent should take steps to examine its internal procedures to ensure that electrical cables are never used when they are in an unsafe state.

32. The evidence before the Board is such that it is more probable than not to conclude that the respondent never received any complaints from the complainant concerning safety matters; that any complaints it received were related to supplies and the competence of Mr. Pimpao; that the respondent was, at all material times, only aware of the safety-related incidents which were dealt with in its evidence; and that the respondent's decision to discharge the complainant was totally unrelated to any desire to prevent him from complying with or seeking enforcement of the Act. The most probable conclusion concerning the reason for the complainant's discharge is that it was for the reasons given by Mr. Davis. The complainant was, at all material times, aware that the respondent regarded direct communications with its clients, which could be interpreted as being critical or embarrassing, as being very serious matters. He had already been severely reprimanded once before for such action. He knew that he ought not to disregard the proper channels of communication for making his complaints known and he knew that what he was doing would put his employer in a bad light in the eyes of its clients. The reasonable inference is that he acted in such a way to embarrass his employer because he believed that his complaints about Mr. Pimpao's competence were obviously not being accepted at face value.

33. In any event, the complainant has argued that he was in fact seeking compliance of sections 14(1)(b), 14(2)(g), 16, and 17(1)(c). Those sections read:

"14.-(1) An employer shall ensure that,

...

- (b) the equipment, materials and protective devices provided by him are maintained in good condition;

...

- (2) Without limiting the strict duty imposed by subsection 1, an employer shall,

...

- (g) take every precaution reasonable in the circumstances for the protection of a worker;

...

16.-(1) A supervisor shall ensure that a worker,

- (a) works in the manner and with the protective devices, measures and procedures required by this Act and the regulations; and

- (b) uses or wears the equipment, protective devices or clothing that his employer requires to be used or worn.
- (2) Without limiting the duty imposed by subsection 1, a supervisor shall,
 - (a) advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;
 - (b) where so prescribed, provide a worker with written instructions as to the measures and procedures to be taken for protection of the worker; and
 - (c) take every precaution reasonable in the circumstances for the protection of a worker.

17.-(1) A worker shall,

...

- (c) report to his employer or supervisor the absence of or defect in any equipment or protective device of which he is aware and which may endanger himself or another worker."

34. With respect to the duties imposed on employers and supervisors in sections 14 and 16 of the Act, there is no evidence to suggest that the complainant ever clearly brought to the attention of his employer and supervisors that his criticisms dealt with any matters within the ambit of those sections. The respondent's evidence was that it did not interpret the complainant's criticisms as being about safety matters, and the complainant himself testified that he regarded his list and subsequent discussions with the respondent as dealing primarily with Mr. Pimpao's performance as supervisor. It is the most probable conclusion, based on the evidence, that the complainant never made any attempt to discuss safety, *per se*, or violations of the Act with either his employer or supervisors. There is also insufficient evidence to conclude that either the employer or any of its supervisors were in violation of the Act. The evidence regarding the safety situation as a whole and the complainant's failure to bring safety clearly forward as a topic for discussion, leads the Board to the conclusion that he was not trying to ensure compliance with or enforcement of the Act insofar as it concerns the respondent or its supervisors.

35. It is true that section 17(1)(c) imposes a duty on an employee to report certain matters "to his employer or supervisor". The duty is to report to those people alone and not to the employer's customers or to the world at large. There was never a report. At most, there was a notice that the complainant was going to report some things. The notice did no more than suggest that obligations under the Act are possibly not being met. The notice itself would not serve as a report within the meaning of section 17(1)(c). At most, the notice written in the log book can be regarded as notice to the respondent that the complainant intended to make some sort of report which might fall within the scope of the report contemplated in section 17(1)(c). Assuming that the Act protects those employees who give notice that they intend to comply with a specific duty under the Act at some unspecified date, the employee claiming this sort of protection is not entitled to use the idea of safety to make him immune to discipline if he

chooses an inappropriate medium for conveying this message. In particular, the employee is not entitled to disregard his basic duty of loyalty to his employer's interests in choosing how to convey his message. It may be arguable that extreme safety situations justify extreme methods or that extreme safety situations should influence the Board's determination about the appropriateness of a penalty; however, this is not an extreme case of that sort.

36. In conclusion, therefore, the Board does not find that the respondent violated section 24(1) of the Act nor does it consider that there is any reason for exercising its discretion to modify the penalty. Accordingly, the complaint is dismissed.

37. In taking this action the Board wishes to emphasize that this decision should not be read as denying the protection of the Act to employees who seek to fulfill their obligations to report safety matters to their employers.

2271-79-R The Ironworkers' District Council of Ontario, and The International Association of Bridge, Structural and Ornamental Ironworkers, Local Unions 700, 721, 736, 759, 765 and 786, Applicant, v. William A. Squire, Roy Squire and William Munro, carrying on business as **Brant Erecting and Hoisting**, Beverley Munro, carrying on business as Provincial Steel and Beverley Munro Inc., carrying on business as Provincial Steel, Respondent.

Related Employer – Three partners establishing business – Partnership dissolved – New company established for principal partner to carry on business – Declaration issuing

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members C. A. Ballentine and C. G. Bourne.

APPEARANCES: *S. Wahl, J. Harrower and K. Childs for the applicant; Marc Lefebvre and William Munro for the respondent.*

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN AND BOARD MEMBER C. A. BALLENTINE; July 16, 1980

1. This is an application under sections 55 and 1(4) of *The Labour Relations Act*. The applicant union contends that there has been a "transfer of a business" within the meaning of section 55 from William A. Squire, Roy Squire, and William Munro, a partnership carrying on business as Brant Erecting and Hoisting, to Beverley Munro Inc. carrying on business as Provincial Steel. In addition, and or in the alternative, the applicant argues that Brant Erecting and Hoisting, and Provincial Steel should be treated as one employer pursuant to section 1(4) of the Act.

2. In or about March, 1976 Roy Squire, Bill Squire and Bill Munro formed a partner-

ship known as Brant Erecting and Hoisting for the purpose of carrying on a steel erecting, building, and fabricating business. The three partners had formerly been employed by Steel's Erecting and Hoisting and, when Steel's went out of business, they decided that there was "room in the market" for them. Munro had been the defunct firm's estimator, and the Squire brothers worked in the field. No capital was needed to start the new business. The enterprise was small and the necessary equipment could be borrowed or rented. The three partners already possessed such experience or expertise as was necessary.

3. Brant Erecting and Hoisting carried on business primarily in Western Ontario; but occasionally performed work as far east as Ottawa. Most of the projects were quite small; although from time to time, the business would employ as many as 50 ironworkers. The firm was "unionized" in all its aspects (i.e. in all sectors in which it operated). In accordance with the relevant collective agreements, ironworkers were hired, as needed, from the Union hiring hall.

4. In the initial stages of its existence the firm was moderately successful. Profits were retained and used to purchase equipment. The business acquired a shop facility, housed in a building costing approximately \$30,000.00 and constructed on an Indian reserve near Brantford. Title to the real property was vested in Bill and Roy Squire's father. The business used the premises rent free. The firm's equipment included two pick-up trucks, cutting torches, welding machines, compressors and a variety of small tools. Its offices were located in Bill Munro's basement. Munro's residence was the firm's business address and Munro's phone number was used for business purposes.

5. Bill Munro was the key figure in the enterprise supplying virtually all of the business expertise and entrepreneurial initiative. Munro had worked in the industry for many years and had useful contacts and a good business reputation. It was Munro who solicited business, did the estimating and bidding for jobs, prepared price and man-hour projections to establish the work force which would be required, did the take-offs from the drawings, kept the books, prepared the payroll, and did the invoicing and other documentation associated with the business. It was Munro who signed the collective agreement on behalf of the partnership. The Squire brothers were "working foremen" who, together with the hired labour force, actually did the work on site.

6. In or about April, 1978 the firm bid on a project near the City of Windsor referred to by Munro as the "Unimade project". Munro testified that this contract "went sour" and a number of companies, including Brant Erecting and Hoisting, suffered substantial losses. Brant's loss amounted to approximately \$40,000.00. In January, 1979 Munro negotiated a short term arrangement which permitted Brant Erecting and Hoisting to continue working on the site until April 20, 1979; but thereafter, the firm did not carry on any further business activities. Munro himself terminated his relationship with Brant Erecting and Hoisting on or about April 1, 1979 and within two weeks the company had become inactive. The Squire brothers made some attempts to carry on business but without Munro they were unable to do so. After a further unsuccessful attempt to establish a new business of their own, and a period of unemployment, they found work as "working foremen" for Dominion Bridge in Toronto. Bill Squire testified that the functions he is currently performing as an employee for Dominion Bridge are identical to those which he performed for Brant Erecting and Hoisting (except of course, he was a partner in the latter business).

7. When the partnership ceased to carry on an active business there were substantial

outstanding debts. Bill Munro retained the books for the purpose of winding up the partnership and also retained some \$1500.00 worth of office equipment which was located in his basement. Munro continued to record various financial transaction in the books until early in 1980; although all of these transactions involved the settling of accounts for work completed prior to April 20, 1979. There was no new business after that date.

8. The Squire brothers disposed of the vehicles, tools and equipment formerly used by the partnership. The funds realized from these sales may have been used to pay certain creditors, but in any event, these funds did not accrue to the benefit of Munro or the alleged related/successor employer. The shop premises remain in existence, but being on an Indian reserve are immune from execution or attachment. Bill and Roy Squire made an assignment in bankruptcy on January 29, 1980. On February 6, 1980 there was a formal dissolution of the partnership; however in accordance with section 33 of *The Partnerships Act*, R.S.O. 1970, c. 339 there was probably a "deemed dissolution" in April, 1979 when the firm's debts exceeded its revenues, and it was unable to meet its financial commitments as they came due. To date, Bill Munro has not declared bankruptcy and he advised the Board that there were a number of outstanding writs and judgements against him.

9. Beverley Munro Inc. was incorporated on May 8, 1979. The articles of incorporation indicate that the purpose of the company, *inter alia*, is to carry on the business of steel erecting, building and fabricating. The business actually commenced in late March of 1979 and was carried on as a sole proprietorship until the creation of the corporate vehicle. The name "Provincial Steel" was registered on May 22, 1979.

10. Beverley Munro, the wife of Bill Munro is the sole owner of the company by virtue of her ownership of one outstanding common share with a nominal value of one dollar. No capital was needed to start the business, save a small amount for incorporation fees. Mrs. Munro is the only director and officer of the company; however she candidly admitted that she knows nothing about the steel erecting business, takes no active part in the business, and relies on her husband to manage the company's ongoing business activities. The Munros both testified that the company was created so that Bill Munro could remain employed in the business with which he was familiar. Because Munro had substantial outstanding liabilities, he did not believe he could incorporate a company himself.

11. Munro is an employee of Beverley Munro Inc. and performs the same role for Provincial Steel as he performed for Brant Erecting and Hoisting; except that, for Provincial Steel, he also occasionally works on the site as a working foreman. The business is still run from the Munro's home, using the office equipment previously used by Brant Erecting. Again, it is Mr. Munro's business acumen and contacts within the industry which provide the source of work for the new company. Many of the customers are the same as those served by Brant Erecting; and Munro has even been able to "win back" certain customers who had dealt with Brant Erecting, become dissatisfied, and gone elsewhere. The character of the business, market, and mode of operation, are identical to that of Brant Erecting. None of the employees are the same. Provincial Steel has sought to operate as a "non-union" company, and denies that it is bound by any collective agreement or bargaining relationship with the applicant union.

12. Section 1(4) of *The Labour Relations Act* provides as follows:

"Where, in the opinion of the Board, associated or related activities or

businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section 55 which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section 55 has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights. Since the two sections are complementary, it is not unusual, as in the present case, for an applicant to rely on both.

13. Section 1(4) does not require that related business activities under common control or direction be carried on simultaneously or contemporaneously. This issue was clarified in 1975 by the addition to section 1(4) of the phrase "whether or not simultaneously". The amendment reflects a legislative recognition that the essential unity and identity of an economic activity (which gives rise to employment) may be preserved even though the legal vehicles through which the activity is carried on will not operate simultaneously; and, business may be effectively transferred from one corporate entity to another, without any of the indicia of a "transfer of a business" which might trigger the application of section 55. This is especially the case in the construction industry where many of the employers will not have the permanence or investment in fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from jobsite to jobsite or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. In such circumstances there may be an effective transfer of business between related businesses without any apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business as before. Indeed there will often be good commercial reasons for doing so unrelated to any express desire to undermine the union's bargaining rights. The earlier company may have run into financial difficulties, or lost its reputation, or there may be legal, accounting or tax advantages in establishing a new vehicle through which the business, or related business activities can be conducted. Again, it is quite possible to do this without a clear and concrete

disposition between the two firms so as to call section 55 into play. To ensure that the industrial relations status quo is preserved, the Legislature has provided that where two employers carry on related economic activities, under common control and direction, whether or not simultaneously, they can be treated as one for the purposes of the Act. However, it should be noted that section 1(4) is discretionary. The Board need not make a 1(4) declaration even when the conditions precedent are present; and has not done so, for example, where a trade union is seeking to *extend* rather than *preserve* its bargaining rights.

14. There can be little doubt on the evidence before us that Bill Munro exercises effective direction and control over Provincial Steel – even though his wife owns the company, and occupies a nominal managerial position. It is Bill Munro who has the business experience, knowledge of the industry, contacts and expertise to manage the company's business activities. It is he who solicits customers, develops the business, ensures that the work is properly done, issues the bills, and keeps the company's accounts. Beverley Munro plays no active part in any of these functions, and, as we have already pointed out, the new business and its corporate vehicle were created so that Bill Munro could continue in the business with which he was familiar, despite the financial difficulties which had befallen Brant Erecting. Once the new company was formed, Bill Munro carried on very much as before. Indeed, he testified that he became involved in Provincial Steel in late March 1979 (when it was carrying on business as a sole proprietorship) prior to the termination of Brant Erecting's activities on the Unimade job, and long before the formal bankruptcy of his partners or the dissolution of the partnership. No doubt the outstanding liabilities would have made it exceedingly difficult to carry on the business of Brant Erecting without the injection of capital which none of the partners possessed; but it is clear that the departure of Munro also made it impossible, and guaranteed the termination of the business as a going concern. Thereafter the partnership existed solely for the purpose of winding up. We are satisfied that Munro's pivotal role in running the affairs of Brant Erecting and Hoisting and Provincial Steel, satisfies the requirement under section 1(4) that two allegedly "related" employers must be "under common control or direction".

15. A more difficult question is whether Brant Erecting and Hoisting and Provincial Steel can be said to have engaged in "associated or related activities or businesses" since, for practical purposes, Brant Erecting ceased to exist as a going concern prior to the establishment and subsequent incorporation of Provincial Steel. The respondent contends that the two businesses cannot be "related" within the meaning of section 1(4) because they were never engaged in any joint ventures or business endeavours, nor were they carrying on business at the same time. The respondent argues that such overlap as there may have been between the activities of Provincial Steel and Brant Erecting, was solely for the purpose of winding up the latter company, and cannot be regarded as the kind of related activity to which section 1(4) is directed. But for the 1975 amendment to the Act, this argument would have considerable force; but it is now clear that the "associated or related activities or businesses" need not be carried on simultaneously. The amendment extends the ambit of section 1(4) to situations in which one business entity is actively carrying on business and the other is not. It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simul-

taneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

16. The present case provides a classic example of the kind of business situation to which section 1(4) was intended to apply. The business of Brant Erecting, which was largely controlled and directed by Bill Munro, ran into difficulties and came to a halt in April, 1979. Munro, who, we are satisfied was the principal entrepreneurial force behind the Brant Erecting business severed his connection with that firm and immediately established a virtually identical business under the name of Provincial Steel carried on through a company incorporated by his wife. The business ability, contacts, expertise, and goodwill vested in Bill Munro himself; and some of the assets formerly used by Brant Erecting, became the assets and advantages which were the key to Provincial Steel's business success. There has been no change in the character of the business nor in the employee skills required by it. Provincial Steel is run (as was Brant Erecting) from an office in the Munro's basement and serves essentially the same clientele as was served by Brant Erecting. There was no hiatus between the apparent demise of Brant Erecting and the launching of Provincial Steel as a going concern. This is not a case in which a "key man" leaves one employer to go to work for another, or establishes a new business of his own in competition with his former employer. Here, the incorporation of Beverley Munro Inc., was undertaken so that Bill Munro could carry on essentially the same business as before. In our view these transactions fall squarely within the mischief to which section 1(4) is directed, and we are satisfied on the evidence before us that Brant Erecting and Hoisting and Beverley Munro Inc. carrying on business as Provincial Steel, carry on associated or related businesses, (albeit not simultaneously) under common control or direction. Accordingly, the Board is satisfied that it should declare that these two business entities are and always have been "one employer" for the purposes of *The Labour Relations Act*, and that Beverley Munro Inc. is bound by and must recognize any collective agreements or bargaining rights held by the applicant in respect of Brant Erecting and Hoisting.

17. There remains the question of the application of section 55 of the Act. Section 55 (1) and (2) provide as follows:

"55. - (1) In this section,

- (a) "business" includes a part or parts thereof;
 - (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.
- (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application."

18. Section 55 ensures that upon the transfer of a business from one employer to another, the transferee stands in the shoes of the transferor with respect to established collective bargaining and collective agreement rights. Like section 1(4), section 55 creates a regime of collective bargaining law which modifies the common law principles of privity of contract, and eliminates the significance of the separate legal identity of the successor employer. Section 55 involves two related questions: has there been a “sale” within the extended statutory definition of that term; and does what has been “sold”, “transfer”, or “disposed of”, constitute a “business”, or “part of a business”. Frequently, these are not easy questions to answer as the facts in the present case demonstrate. With the exception of a small amount of office equipment there was no transfer of tangible assets from Brant Erecting to Provincial Steel. The configuration of assets used by Brant Erecting to carry on business (i.e., the pick-up trucks, welding machines, small tools, etc.) were sold, and the shop facility remains unused and beyond reach on the Indian reserve. None of the monies raised by the sale of Brant Erecting’s equipment accrued to the benefit of Provincial Steel. The only element of Brant Erecting’s business which can be traced into the hands of Provincial Steel (apart from the small amount of office equipment already mentioned) is the personality of Bill Munro himself. Munro’s entrepreneurial skills, and contact within the industry are the crucial asset without which neither business could exist. Munro testified, and the example of both businesses clearly demonstrates, that to establish a small steel erecting business neither capital nor assets are required; all that is necessary is know-how, and a good reputation in the industry. On the other hand, Munro’s reputation was not sufficient to save Brant Erecting from insolvency and may even have been tarnished by his relationship with that business. There is evidence that, despite Munro’s good personal reputation, the goodwill of Brant Erecting, the alleged predecessor employer, was virtually non-existent. In the circumstances, it is doubtful whether the insolvent partnership had any goodwill to transfer. There was of course no express transfer of goodwill, nor any express intention to transfer *anything* from one business to the other. If there has been a transfer of a business within the meaning of section 55, it has occurred solely because Bill Munro left the insolvent Brant Erecting and became involved in a new enterprise.

19. The union acknowledges that it is unusual to identify a “business” with a particular individual; or to suggest that when a key individual moves from one business to another there has been a “transfer of a business” between them. The union contends, however, that this is precisely how one must regard what is essentially a “one-man business” relying on the expertise, goodwill, and initiative of a single individual. This is not a case in which the key individual has sought to place his skills at the disposal of a competitor; rather, he has sought to continue his former business. From a practical point of view the essential core of the business has been transferred; although it is equally evident (as the respondent submits) that Munro was trying to effectively separate himself from the partnership and business that was Brant Erecting. That business’ economic organization was entirely dismantled, its assets were dispersed, and its principals all sought employment elsewhere. There is, of course, no suggestion that Brant Erecting was wound up, and Beverley Munro Inc. incorporated for the purpose of undermining the employees’ collective bargaining rights.

20. The section 55 issue raises analytical and interpretative problems of unusual difficulty; and in view of our declaration under section 1(4) that the alleged predecessor and successor constitute “one employer” for the purposes of the Act, it is unnecessary for us to reach any firm conclusion as to whether there has also been a “transfer or a business” between them to which section 55 might apply. The effect of a section 1(4) declaration is to affirm that Brant Erecting

and Hoisting, and Beverley Munro Inc. are "one employer" and must be treated as a single business entity for the purpose of any collective bargaining obligations arising under the Statute. In the circumstances, it is our view that the section 55 issue is entirely academic, and we do not consider it necessary to deal with the matter.

0398-80-R Tom Hodgins – Representing the majority of the members of C.C.W. Union, Local 69, Office Unit, Applicant, v. Canadian Chemical Workers Union, Respondent.

Termination – Timeliness – Collective agreement continuing in accordance with its term – Termination application filed within one month prior to continuation of agreement – Whether timely – Whether duration clause of agreement may close "open" period

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

***APPEARANCES:** Tom Hodgins for the applicant; Daniel Ublansky for the respondent.*

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN AND BOARD MEMBER C. G. BOURNE; July 16, 1980

1. This is an application in which the applicant, Tom Hodgins, seeks to terminate the respondent union's bargaining rights. In support of his application Mr. Hodgins tendered a petition signed by 8 of the 11 individuals in the bargaining unit. The petition clearly indicates that the signatories no longer wish to be represented by the respondent, and we are satisfied that the employees signed the petition voluntarily. Accordingly, the Board is satisfied on the basis of all the evidence before it that not less than 45% of the employees of MacMillan Bloedel Packaging Limited, in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union on June 3, 1980, which is the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act* to be the time for ascertaining the number of persons opposed to the union under section 49(3) of the Act. The sole question before the Board is whether this application is timely. The statutory provision relevant to this determination is section 49(2), which reads as follows:

"(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause *a* or *b* that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.”

2. The parties are bound by a collective agreement which contains the following clause:

“ARTICLE 23: DURATION OF AGREEMENT

All terms set forth in this agreement, unless otherwise stated shall be effective from July 1, 1978 to June 30, 1980 and from year to year thereafter as set forth in the paragraph to follow:

If either party to this agreement shall desire to amend or abrogate any or all of its provisions on June 30th in any year such party shall give the other party notice thereof together with its proposed changes in writing not later than the preceding April 30th.

If either party shall notify the other party in accordance with the preceding paragraph this agreement shall terminate on June 30, 1980. If neither party shall so notify the other party, or if the party who shall have so notified the other party shall fail to furnish its proposed changes in this agreement to the other party, all the provisions of this agreement shall continue in force and effect for a period of one (1) year from the next succeeding July 1st and from year to year thereafter as provided in this twenty-third article.”

Notice to bargain was given on or about March 31, 1980, but to date, the union has not furnished to the employer its proposed changes to the agreement. The union argues that because it has not complied with the terms of Article 23, the agreement *continues* in force for a further year, and does not cease to operate on its nominal expiry date. Accordingly, it is argued that the last two months of its operation are not the two months immediately preceding June 30, 1980, the nominal expiry date. The union contends that the “open period”, during which applications for certification or termination would otherwise be timely, has been “postponed”; and relies on the decision of the Board in *Hield Brothers Limited*, (1957), 57 CLLC 1638, which has been followed in a number of cases since that date (see most recently: *Nortex Products* [1978])

OLRB Rep. Nov. 1036; *London Generator Service*[1978] OLRB Rep. Oct. 932; and *Palmerston Town Manor Home for the Aged* Board File No. 1657-78-M released May 7, 1979, unreported.

3. The *Hield* case involved an interpretation of section 45 of the Act, which provides that either party to a collective agreement may, within ninety days before the agreement "ceases to operate", give notice of a desire to renegotiate the agreement. The *Hield* case held that where a collective agreement provides that it "continues in effect" or "continues in force" it never "ceases to operate" on its nominal expiry date but rather continues as if the term had been longer *ab initio*. The Board reasoned that, there being no termination of the nominal expiry date, there was no "end point" from which to calculate the ninety day period contemplated by section 45 and that consequently that section had no application. In the result, the Board determined that by appropriate language in the collective agreement the parties could modify or eliminate the right to give notice under section 45. In the present case the union relies upon *Hield* for the proposition that the agreement does not "cease to operate" on June 30, 1980 because, in accordance with the *Hield* reasoning, it "continues to operate for another year". How then, argues the union, can it be said that an application made on May 23, 1980 (in the nominal open period) has been made during "the last two months of its operation" as required by section 49(2)(a) of the Act? Section 45 provides a notice period of ninety days before the agreement "ceases to operate". How could the Board find that this notice period is not available because the agreement never did cease to operate (the *Hield* case); then find that the present application is timely because it has been made "after the commencement of the last two month of the agreement's operation?"

4. We might note that in all of the recent cases which have followed the *Hield* decision the Board has expressly indicated that it was doing so "with considerable regret" and because of the reliance interests of the parties, rather than the inherent reasonableness of the original interpretation of section 45, or the industrial relations efficacy of the decision. Indeed, it is difficult to see what policy would be promoted by permitting the parties to "contract out" of the statutory right to give notice prescribed by section 45; and where the legislature has intended that parties could waive a statutory right, it has used very clear language (see for example section 37(5a)). It can hardly further an amicable bargaining relationship if a notice to bargain *prior* to the expiry of the agreement and *within* the time prescribed by section 45, were ineffective - with the result that the right to bargain is lost because the collective agreement automatically continues for a further term. That is the result of the *Hield* reasoning and it is a result which, can be avoided, if the Board were to adopt a different but equally reasonable interpretation of section 45. The approach in *Hield* was not adopted in *Cem-Al Spray Limited*[1974] OLRB Rep. Oct. 688 nor does it appear to be consistent with the decision of the Saskatchewan Court of Appeal in *Utah Company of the Americas v. IUOE et al* (1960), 21 D.L.R. (2d) 166 which was cited with approval in *Selinger Wood*[1979] OLRB Rep. June 574. In that case the Court held that a notice to bargain given in accordance with a provision similar to section 45, was effective despite the fact that it did not comply with the terms of the collective agreement. It is apparent that there has been some inconsistency in the Board's approach and the time may well be ripe for a reconsideration of the *Hield* reasoning. However, we do not think it is necessary to do so in this case. It is sufficient to note that the *Hield* line of cases, arising out of section 45, is of limited assistance in interpreting section 49. Not only is the language and purpose of section 49 different, but in our view the general scheme of the Act militates against the application of the *Hield* approach in section 49 cases.

5. Section 44 of the Act provides that every collective agreement must have a specified term which cannot be abridged without the consent of the Labour Relations Board. The importance of a fixed and readily ascertainable term is easy to understand, for the collective agreement not only establishes the terms and conditions of employment for the employees bound by it, but also establishes the time when those employees can exercise their statutory right to change bargaining agents or terminate their existing bargaining agent's rights. The timeliness of applications for certification or termination is calculated with reference to the so called "open period" of the collective agreement, (which will normally be the last two months of its operation). Employees seeking to apply for termination, or join another trade union, and trade unions seeking to displace an incumbent union, must plan their organizational activities with the open period in mind. It is evident therefore, that the term of the collective agreement must be for a fixed period and clear on its face, so that third parties and the employees bound by it can ascertain when their statutory rights will arise. (See *Seven-Up Ontario Limited* [1972] OLRB Rep. Nov. 965). In the present case, of course, the union contends that the very occurrence of the open period will depend upon whether there is compliance with the notice requirements of the agreement. The respondent candidly admits that this is a matter beyond the employees' knowledge or control and that it would be very difficult for the employees (or another trade union) to organize opposition to the incumbent union without knowing whether the open period would occur in the two months preceding the nominal expiry date of the collective agreement, or a year later. It might also be noted that Article 23 contemplates the giving of notice prior to the commencement of the open period, but permits the delivery of bargaining proposals some time thereafter (but presumably before the nominal expiry date). In such circumstances (on the respondent's view) the union whose status is being challenged can determine whether there will be an open period or not. Clearly, this is not an interpretation which the Board should embrace unless the language of the statute compels it to do so.

6. Section 49(2)(c) regulates the timeliness of termination applications in the case of collective agreements which provide that they will continue to operate for a *further term* if either party fails to give a timely notice to bargain. The section sets out two alternatives when such applications might be timely, – both of which occur during the extended term. We do not think however, that the specification of open periods referable to the extended term, was intended to take away the open period which would have arisen in the normal course. Indeed, the use of the words "further term" in section 49(2) suggests that there was an original term to which section 49(2)(a) would apply. In other words, the collective agreement's initial term expires on the nominal expiry date. The open period in the initial term is determined by section 49(2)(a) to be the last two months of the agreement's operation; then, the open period's in the *further* extended term are determined in accordance with section 49(2)(c). In our view, an application for certification or termination can be made during the two months immediately preceding the nominal expiry date of the collective agreement even if that agreement provides for its continuation or renewal for a further term. The open period cannot be "closed" or "postponed" by the unilateral action of one of the parties. The interpretation urged by the respondent would result in a situation which is both inequitable and inconsistent with the scheme and policy of the Act. In the absence of clear and statutory language that the open periods prescribed by section 49(2)(c) are to replace those prescribed in section 49(2)(a), the Board is satisfied that the open period prescribed by the latter provision is still available.

7. The view which we have taken was adopted by the Board in *Norfolk Knitters*

Limited [1973] OLRB Rep. April 202. The collective agreement before the Board in that case provided:

“This agreement shall continue in effect until the 31st day of March, 1973 and shall continue automatically thereafter for annual periods of one year each unless either party notifies the other in writing prior to the expiration date that it desires to amend or terminate this agreement. Notice of desire to amend the agreement shall only be given within a period of sixty to ninety days prior to the expiration of this agreement.”

Notice was not given in accordance with the agreement's terms, and a certification application was made during the two months prior to the nominal expiry date. The respondent employer argued that the agreement's continued operation rendered the certification application untimely. The Board disposed of the matter in the following words:

“The commencement of the last two months of the operation of any collective agreement must be clearly determined at the time the collective agreement is signed. In this instance we find that the last two months of the collective agreement with which we are here concerned were the months of February and March.”

Thus, in *Norfolk Knitters* the Board permitted a certification application in circumstances which are in all material respects identical to those presently before us.

8. We are satisfied that the Board's approach in *Norfolk Knitters* is the correct one, and that the present application for termination of bargaining rights is timely. Since the applicant has otherwise fulfilled the requirements of section 49, the Board is further satisfied that the Board should direct a representation vote so that the employees will have the opportunity to indicate whether they wish to continue to be represented by the respondent. Those eligible to vote are all office and clerical employees of MacMillan Bloedel at London, save and except supervisors, persons above the rank of supervisor, salesmen and sales trainee, plant manager's secretary, industrial nurse, plant buyer, persons regularly employed during the school vacation period and persons covered by a subsisting collective agreement between MacMillan Bloedel Limited and C.C.W.U. Local 69, on the date hereof, who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

9. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with MacMillan Bloedel Limited.

10. The matter is referred to the Registrar.

0474-80-R Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351, Applicant, v. Clean & Brite Laundry, Respondent.

Sale of a Business – Business becoming insolvent – Part of business subsequently carried on at same location for same clients – Sale occurring

BEFORE: R. D. Howe, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *S.B.D. Wahl and C. Judge for the applicant; William Morden for the respondent.*

DECISION OF THE BOARD; July 18, 1980

1. The name: "Garden City Laundry Limited and New Garden City Laundry Limited, carrying on business as Clean and Bright and Garden City Rental" appearing in the style of cause of this application as the name of the respondent is amended to read: "Clean & Brite Laundry".

2. This is an application under section 55 of *The Labour Relations Act* in which relief is also requested under section 1(4) of the Act.

3. The evidence adduced at the hearing establishes that William Morden purchased Garden City Laundry Limited (hereinafter referred to as "Garden City") on January 1, 1972 and, as President and General Manager, operated a business at 189 St. Paul Street West, St. Catharines, which included two sections – a laundry section and a dry cleaning-uniform rental section. On December 1, 1978, Garden City and the applicant entered into a Collective Agreement covering both sections of the business effective from that date until November 30, 1980 (and from year to year thereafter in the absence of notice of termination or proposed revision). (Some amendments, the details of which are not material to the present application, were agreed to by the parties to that Collective Agreement on November 20, 1979). On April 1, 1979 Garden City agreed to lease the laundry section premises and equipment to Henry Louie who took possession thereof and incorporated New Garden City Laundry and Cleaners Ltd. (hereinafter "New Garden City") to carry on the laundry section business which continued to provide laundry service to the same customers as had previously been served by Garden City. Morden was hired by New Garden City as Plant Manager of the laundry. Morden also continued to be the General Manager of the Garden City dry cleaning-uniform rental section of which he had retained ownership and control. It was common ground between the parties that the April 1, 1979 transaction constituted a "sale" of a "business" within the meaning of section 55 of the Act. Louie testified that his lawyer advised him that New Garden City would be bound by the aforementioned Collective Agreement under *The Labour Relations Act*. However, Louie sought to obtain "some relief" through negotiations with the applicant. These negotiations culminated in a Collective Agreement being entered into between New Garden City and the applicant, the terms of which are identical to those contained in the Garden City Collective Agreement (including the November 20, 1979 amendments).

4. On March 1, 1980, Morden sold Garden City to C.I. Services. Although Morden

ceased to be the President of Garden City as a result of this transaction, he continued to be its General Manager and the Plant Manager of New Garden City.

5. Louie testified that on April 25, 1979 he “walked away from the business which [he] operated as New Garden City” and thereby “abandoned” or “forfeited” the premises, due to the insolvency of New Garden City. On the instructions of a trustee in bankruptcy, Louie removed the financial records and some other assets from the premises at that time. A few days later he delivered letters to Morden and the other employees advising them that New Garden City was going out of business and that they were terminated. He further testified that New Garden City is in the final stage of winding down to go out of business.

6. When New Garden City ceased operation on April 25, 1980, Morden contacted Marv Holland, the owner of C.I. Services, to enquire whether C.I. Services wished to operate the abandoned laundry. Holland advised Morden that C.I. Services was definitely not interested in operating a laundry. Morden then attempted unsuccessfully to interest some local entrepreneurs in operating the laundry, but did succeed in selling on behalf of C.I. Services some of the laundry equipment. Morden then decided to purchase some of the remaining New Garden City laundry equipment to set up a laundry in another location in St. Catharines. However, as a result of negotiations with C.I. Services, Morden entered into an arrangement under which C.I. Services provides Morden with the use of the laundry section of the premises at 189 St. Paul Street West and the laundry equipment therein in return for a percentage of the revenues received by Morden for laundry services.

7. Pursuant to that arrangement, on May 12, 1980 Morden began to manage and operate a laundry at that location under the name “Clean & Brite Laundry”. Using equipment formerly used by New Garden City, the respondent provides laundry service to fifteen commercial (hotel and motel) customers, twelve of which were customers of New Garden City and three of which are new customers. Three of the seven persons employed by the respondent are former employees of New Garden City. The work performed by the employees of the respondent is identical to the work formerly performed by the employees of New Garden City except that there has been a decrease in the volume of the work performed and the number of machines operated.

8. Section 55 provides, in part:

“55. (1) In this section,

(a) ‘business’ includes a part or parts thereof;

(b) ‘sells’ includes leases, transfers and any other manner of disposition, and ‘sold’ and ‘sale’ have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold, is, until

the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.”

In *More Groceterial Limited*, [1980] OLRB Rep. Apr. 486 the Board described the scope and purpose of section 55 as follows:

“15. Section 55 of *The Labour Relations Act* is a very important part of the legislation guarding against the subversion of acquired collective bargaining rights and providing some permanence to them in an otherwise volatile commercial context. In the former respect, it is assisted by the various unfair labour practice sections of the *Act* together with section 1(4) which permits the Board to treat as one employer a business carried on through more than one corporation where there is a common control or direction and whether or not these businesses are being carried simultaneously. . . .

16. Unfortunately, however, the latter function of the section – providing some permanence to collective bargaining rights – is often the most difficult to apply. Here the Legislature has determined that the objectives of labour relations policies require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by protection to the employees from a sudden change in the employment relationship. Indeed, the transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees and their representatives are assured of some real measure of continuity in the collective bargaining process by operation of law. So strong is the basis of this policy that the Supreme Court of the United States arrived at a similar conclusion without the benefit of a specific statutory provision like section 55. See *John Wiley & Sons Inc. v. Livingston* (1964) 376 U.S. 543, 84 S. Ct. 909; Goldberg, *The Labor Law Obligations of a Successor Employer* (1969), 63 N.W.L. Rev. 735; Note, (1966), 66 Col.L.Rev. 967; Note, (1969), 82 Harv.L.Rev. 418. This ongoing nature of collective bargaining agreements underlines again that such documents are not ‘ordinary contracts’ nor are they in any real sense the simple products of consensual relationships. See *McGavin v. Toastmaster Ltd. v. Ainscough et al* [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1 Laskin, C.J.C. It is against these impressive policy considerations that the Board must give meaning to and apply section 55.

17. The fundamental issue in cases of this kind is the threshold determination of the section: Has a business been sold? The term ‘sells’ is defined to include ‘leases, transfers, and any other manner of disposition.’ This all-embracing definition obviously reflects the labour relations policy considerations discussed generally above. To repeat, collective bargaining rights are not to be treated as co-extensive with commercial ownership and, to this extent, labour law policy seeks to insulate industrial relations from disruption by necessary and inevitable interaction in the market place. The term ‘business’, on the other hand, is simply defined to

include 'a part or parts thereof.' No similar exhaustive definition, was attempted by the Legislature in recognition, we think, of the great diversity in commercial affairs and the resulting need for a case by case elaboration of the term in the light of labour law policy. . . ."

9. In accordance with its legislative mandate under section 55 and in view of the important labour relations purposes which the concept of successorship is intended to serve, the Board has always construed the term "sale" broadly (see, for example, *Thorco Manufacturing* (1965), 65 CLLC ¶16,052). Thus, in determining whether there has been a "sale" of a "business" within the meaning of section 55, the Board takes into account the totality of the transaction and places little reliance on its outward legal form (see *Hughes Boat Works Incorporated*, [1977] OLRB Rep. Dec. 815; application for judicial review dismissed, (1979) 26 O.R. (2d) 420 (Div. Ct.)). The interposition of a third party acting as an agent or conduit does not preclude the Board from finding that a sale of a business has occurred (see *Sisman's of Canada Limited*, Board File No. 0218-80-R, dated July 10, 1980, as yet unreported; *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, at paragraph 28; and *Big Bear Storage*, [1979] OLRB Rep. Mar. 164), nor does a reduction in the scope of the operation (see *Marvel Jewelry Limited and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733, at paragraph 12).

10. It was submitted on behalf of the respondent that the fact that the laundry was closed for a period of approximately two weeks (from April 25, 1980 to May 12, 1980) precluded a finding that a sale of the business had occurred. However, the existence of an interval between the time that the predecessor employer ceases operation and the alleged successor employer commences operation does not preclude a finding of successorship, where, as in the present case, the evidence establishes some form of continuity such as the continued existence of goodwill (see *Sisman's of Canada Limited*, *supra*; and *Zehrs Markets Limited*, [1974] OLRB Rep. May 331). As noted by the Board in *Hughes Boat Works Incorporated*, *supra*, at paragraph 30, "what is referred to as a continuation of the business has reference not to a continuum in time, but in the nature of the business". Accordingly, the Board found the respondent in that case to be a successor employer even though the predecessor's business had been closed down for approximately five months. It is clear in the present case that the goodwill associated with New Garden City was not totally dissipated by the shutdown of approximately two weeks as twelve of the respondent's fifteen customers were former customers of New Garden City.

11. In the present case, the respondent, with the authorization of New Garden City and its owner, C.I. Services, took over the premises and much of the equipment previously utilized by New Garden City. It employed persons, some of whom were former employees of New Garden City, to perform the same tasks as had been carried out by the employees of New Garden City through the use of the same skills to provide the same service to customers, of which eighty per cent were former customers of New Garden City. The employees of the respondent are supervised by Morden, the same person who supervised the New Garden City work force and whose operational and managerial skills guided New Garden City's laundry operation.

12. Having regard to all the evidence, the Board finds and declares that a sale of a business within the meaning of section 55 took place on May 12, 1980 between the respondent, as successor employer, and New Garden city, as predecessor employer. The Board further declares that the respondent is bound by the Collective Agreement dated December 1, 1978 (as

amended on November 20, 1979) between New Garden City and the applicant, by virtue of section 55(2) of the Act.

13. In view of our disposition of the section 55 application, it is unnecessary for the Board to determine whether relief could also have been granted to the applicant under section 1(4) of the Act.

**0133-80-R Graphic Arts International Union London Local 517,
Applicant, v. Devon Studio Walkerville Printing Company Limited,
Respondents.**

**Collective Agreement – Related Employer – Related employers operating in one location –
One employer engaging in joint negotiations with other unrelated employers – Collective agreement
binding all related employers**

BEFORE: M. Picher, Vice Chairman, and Board Members T.G. Armstrong and M.J. Fenwick.

APPEARANCES: *Brian A. Foster and Ron Burman for the applicant; Fred C. Clark for the respondents.*

DECISION OF THE BOARD; July 23, 1980

1. The applicant has applied to the Board for an Order under section 1(4), and section 55 of *The Labour Relations Act*. It asks the Board to declare that the respondent, Devon Studio, is party to a collective agreement dated the 8th day of August, 1979, and that employees covered by the agreement are entitled to retroactive compensation from January 1, 1979 to the date of their termination. It further requests a determination that the respondent Walkerville Printing Company Limited is bound by the same collective agreement or, in the alternative that it is required to bargain with the applicant with a view to making a collective agreement.

2. Walkerville Printing Company Limited has been in the printing business in the Windsor area for sixty-three years. In 1972, it formed a partnership with Windsor Print and Litho Ltd. to establish a printing business under the name of Devon Graphics. Both Walkerville Printing Company Limited and Windsor Print and Litho Ltd. are in the business of selling printing on a brokerage basis. Having contracted to provide printing to their customers, they then purchase the component parts of the printing service that a particular contract calls for. They set up Devon Graphics to provide them with printing services. Employing approximately fourteen people, principally in the operation of presses and bindery equipment, Devon Graphics in fact has only two customers, its parent partners Walkerville Printing Company Limited and Windsor Print and Litho Ltd.

3. Devon Studio is a sole proprietorship of Mr. Fred Charles Clark, who is also president, treasurer and a member of a family with controlling shares in Walkerville Printing

Company Limited. Devon Studio provides photo composition services, art work and type-setting services to its customers. It is now a shell, having gone out of business on or about August 7, 1979. Prior to that, from the time it was established in 1966, its principal customers were Walkerville Printing Company Limited and Windsor Print and Litho Ltd.

4. The evidence establishes a close interrelationship between Walkerville Printing Company Limited, Windsor Print and Litho Limited, Devon Graphics and Devon Studio. They all occupy one building at 3005 Marentette Avenue in Windsor. Although the evidence is not precise on this point, the building appears to be owned either by Windsor Print and Litho Ltd. or by its two controlling shareholders, Mr. Harold Rindilsbacher and Mr. Ulrich Ireson. While there appears to be no corporate relationship between Windsor Print and Litho Ltd. and Devon Studio, the evidence establishes that before going out of business Devon Studio occupied its portion of the premises rent free.

5. There is also a considerable amount of supervisory interchange among the four entities. While Mr. Clark would normally manage Devon Studio during its operation, in the event of his absence, that business was also supervised by Mr. Fraser Lobban, the general manager of Walkerville Printing Company Limited. It appears that Mr. Lobban also runs Devon Graphics along with Mr. Rindilsbacher, Mr. Ireson and Mr. Clark. The capital equipment of Devon Studio was entirely owned by Walkerville Printing Company Limited.

6. As complicated as it may appear, the evidence discloses a fairly simple arrangement whereby Walkerville Printing Company Limited and Windsor Print and Litho Ltd. engaged in a joint venture, all under one roof, to better service their respective printing contracts. While the Board is not called upon in this application to determine the entire extent of the relationship between all four of the entities involved, we are satisfied on the basis of the evidence before us that Walkerville Printing Company Limited and Devon Studio, both under the substantial control and direction of Mr. Clark, are associated or related businesses within the meaning of section 1(4) of *The Labour Relations Act*.

7. We turn to consider the legal consequences of that determination and to consider the union's allegation that Devon Studio was bound by a collective agreement between January 1, 1977, and the day it closed on August 7, 1979. On June 27, 1978 the applicant was certified as exclusive bargaining agent of the employees of Devon Studio. Thereafter it commenced bargaining with Mr. Clark with the view to making a collective agreement for the two employees then in the bargaining unit. The parties were unable to conclude an agreement and proceeded to conciliation. A "No Board report" was issued by the Deputy Minister of Labour on October 2, 1978 and shortly thereafter the parties were in a position to strike and lock out.

8. During the same period Mr. Clark was also negotiating with the applicant the renewal of a collective agreement of the employees of Devon Graphics. That negotiation was part of a joint bargaining arrangement in which Mr. Clark was the spokesman for two other unrelated Windsor printing companies, Curtis Company Limited and Commercial Printing Company, as well as Devon Graphics. On November 23, 1978 Devon Studio and the union jointly executed a document entitled "Memorandum of Basis of Settlement". It provides as follows:

"The undersigned parties agree that Devon Studio will join with Curtis Company Limited, Commercial Printing and Devon Graphics in the

negotiations for the renewal of the collective agreement covering letterpress and typesetting personnel which terminates December 31, 1978. The results of these negotiations will determine the term, language, wages and fringe benefits.”

9. Subsequently, on August 8, 1979 the applicant and the three companies named in the memorandum of agreement concluded a collective agreement effective from January 1, 1979. The union submits that the terms of that collective agreement apply *mutatis mutandis*, to the employees of Devon Studio as a direct result of the memorandum of agreement signed November 23, 1978. It maintains that the purpose of the memorandum was to effectively bring Devon Studio to the joint bargaining table and have the parties bound by the collective agreement issuing from the multi-party negotiations.

10. The respondent takes a different view. Mr. Clark argues that the memorandum of settlement, signed by himself and Mr. Lobban, was not intended to have any binding effect on parties. He submits that it was merely a precatory document expressing the general intention of both the employer and the union to await the result of the joint negotiations so that they could better frame their respective bargaining positions in light of the joint collective agreement. In other words, he argued that it was an agreement to bargain and not an agreement to be bound by the terms of the collective agreement that would result from the joint negotiations.

11. This Board can accept neither Mr. Clark’s evidence as to his own belief in that regard nor his submission as to the legal significance of the memorandum of agreement which he signed. A document executed in the course of collective bargaining is normally presumed to mean what it says. If it is not ambiguous oral evidence extrinsic to the agreement is not admissible to contradict its terms or affect its interpretation. (*Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.* (1969), 3 D.L.R. (3d) 161 (Ont. H. Ct.) at pp. 215-216). This Board cannot, on the balance of probabilities, conclude that by executing the memorandum of agreement of November 23, 1978 the parties did not intend to bind themselves to any greater obligation than merely to bargain at some indefinite time in the future. That is simply not consistent with the words of the memorandum, signed as it was during the period when the parties could strike or lock out, and executed as the result of the effort of a mediator who witnessed the document. The clear words of the memorandum do not contemplate that the parties would keep a watching brief on the joint negotiations. On the contrary, it stipulates “that Devon Studio will *join* with Curtis Company Limited, Commercial Printing and Devon Graphics in the negotiations for the renewal of the collective agreement . . . The results of these negotiations will *determine* the term, language, wage and fringe benefits.” (emphasis added.)

12. The evidence establishes that the union relied on the memorandum of agreement and proceeded on the understanding that thereafter Mr. Clark also bargained for Devon Studio in the joint negotiations. When a tentative agreement was reached in the joint bargaining the union continued to rely on that understanding and conducted itself in a way consistent with its view that Devon Studio was bound by the terms of the joint collective agreement. The union included the two employees of Devon Studio in the ratification vote for the joint contract. On July 4, 1979 it forwarded to Mr. Clark a copy of the Devon Studio contract incorporating the terms of the joint collective agreement, the only formal alteration being the deletion of any reference to Letterpress employees since Devon Studio did not have a letterpress operation. That was done in response to a concern expressed by Mr. Clark.

13. The position of the union is that the collective agreement between itself and Devon Studio is a composite of two documents, being the memorandum of agreement of November 23, 1978 and the joint collective agreement concluded with Devon Graphics, Commercial Printing Company and Curtis Company Limited on August 8, 1979. On the evidence before it this Board must accept the union's position.

14. The Act defines "collective agreement" as follows:

"1. 1. . .

- (e) 'collective agreement' means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement;"

15. The existence of a collective agreement depends on two elements: the agreement of the parties and the reduction of their agreement into writing. (*Ferranti-Packard Limited*, [1977] OLRB Rep. Mar. 169.) The Board has consistently taken the view that the existence of a collective agreement under the Act need not depend on there being a single comprehensive document signed by the parties. A collective agreement may be evidenced through a number of documents, including memoranda and correspondence, which sufficiently define the terms of parties' agreement (*Rossi Bakery Limited*, [1964] OLRB Rep. July 266; *Crestile Limited*, [1967] OLRB Rep. Apr. 41; *Graphics Centre (Ontario) Inc.*, [1976] OLRB Rep. May 221).

16. In this case the memorandum of agreement of November 23, 1978 effectively adopts by reference the joint collective agreement negotiated by Mr. Clark as the collective agreement governing the terms and conditions of employment of the employees of Devon Studio. Read together, the two documents constitute a collective agreement between the applicant and the respondent Devon Studio for the year 1979. It follows that the respondent Devon Studio is required to provide wages and benefits retroactively to its employees for the period of their service between January 1, 1979 and the day that it terminated its employees.

17. The evidence establishes that work previously performed by Devon Studio is now being done within Walkerville Printing Company Limited. Given the Board's determination that Devon Studio and Walkerville Printing Company Limited are one employer for the purpose of the Act, it follows that the collective agreement applies as well to any employees of Walkerville Printing Company Limited who would fall within its terms, including the employee performing the transferred work, disclosed by the evidence to be Ms. Sonderhouse. It also follows that the bargaining rights which the applicant had for the employees of Devon Studio continue in respect of the employees of Walkerville Printing Company Limited who would fall within the scope clause of the collective agreement. Given the foregoing determinations, we need not deal with the section 55 aspects of the application.

18. The Board therefore declares:

- (i) that Devon Studio and Walkerville Printing Company Limited are

associated business within the meaning of section 1(4) of *The Labour Relations Act*. They are a single employer for the purposes of the Act;

- (ii) that Devon Studio and Walkerville Printing Company Limited are bound by the collective agreement entered into by the applicant and Commercial Printing Company, Curtis Company Limited and Devon Graphics on August 8, 1979;
- (iii) that the bargaining rights of the applicant in respect of the employees of Devon Studio continue in respect of Walkerville Printing Company Limited to the extent that its employees fall within the terms of the said collective agreement.

19. The Board shall remain seized of this application in the event of any disagreement of the parties in respect of its interpretation or implementation.

0658-80-JD Doef's Ironworks Ltd., Complainant, v. International Brotherhood of Boilermakers Iron Ship Builders Blacksmiths Forgers & Helpers, International Brotherhood of Boilermakers Iron Ship Builders Blacksmiths Forgers and Helpers, Local 128, and International Association of Bridge, Structural, Ornamental & Ironworkers, Local 721, Respondents.

Jurisdictional Dispute-Interim order issuing where strike imminent or taking place – Legality of strike not in issue before Board under section 81

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

DECISION OF THE BOARD; July 21, 1980

1. In a decision dated June 30, 1980, the Board issued the following interim order pursuant to section 81(8) of the Act:

“Doef's Ironworks Ltd. shall continue to assign the work of erecting and bolting together six prefabricated steel storage tanks on the premises of Mobil Chemical Canada Limited at 323 University Avenue, Northwest Industrial Park, Belleville, to members of the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721.”

2. The respondents International Brotherhood of Boilermakers Iron Ship Builders Blacksmiths Forgers & Helpers (“Boilermakers”) and International Brotherhood of Boiler-

makers Iron Ship Builders Blacksmiths Forgers and Helpers, Local 128 ("Boilermakers Local 128") challenged the jurisdiction of the Board to entertain this complaint. The complainant and the respondent International Association of Bridge, Structural, Ornamental & Ironworkers, Local 721 ("Local 721") adopted the position that the Board had jurisdiction to entertain this complaint. In its decision dated June 30, 1980, the Board stated that it would give written reasons for its finding that the Board had jurisdiction to entertain this complaint. These reasons are now set forth.

3. The Boilermakers and Boilermakers Local 128 adopted the position that the Board lacked jurisdiction under section 81(8) or 81(9) of the Act because a strike was neither imminent nor was taking place. As an alternative position the Boilermakers and Boilermakers Local 128 argued that if any strike was imminent or was taking place there was no evidence that such a strike was unlawful.

4. The evidence established that the complainant was awarded a contract from Mobil Chemical Canada Limited ("Mobil") for the erection and bolting together of six prefabricated steel storage tanks on Mobil's property at 323 University Avenue, Northwest Industrial Park, Belleville. Mobil has also entered into a contract with a general contractor to build a new plant number two which is two hundred yards down the road from plant number one. The tanks are between two hundred and two hundred and fifty feet from the new plant number two. The complainant's employees and the employees of the sub-contractors of the general contractor use the same entrance to enter Mobil's property. The complainant commenced to erect the tanks on June 13, 1980, and employed five members of Local 721 to erect the tanks. The complainant and Local 721 are bound by two collective agreements. One of these collective agreements covers construction work and the other collective agreement covers maintenance work. The complainant and Boilermakers and Boilermakers Local 128 are not bound by a collective agreement. The complainant assigned the work of erecting the tanks to members of Local 721 pursuant to the collective agreement which covers construction work and which is binding on the complainant and Local 721.

5. On June 13, 1980, the complainant's president received a telephone call from Mr. McManus of the Boilermakers who inquired who was being asked to erect the tanks. Upon being told that the complainant was using ironworkers, Mr. McManus stated that it was boilermakers' work and informed the complainant's president that he would see him on the picket line because it was boilermakers' work. The complainant continued the erection of the tanks on June 16, 17 and 18 without incident. On June 19, 1980, a picket line was established outside the construction workers' entrance to Mobil's property for part of the working day. One of the pickets identified himself as being "from the Boilermakers". On that same date two representatives of Boilermakers Local 128 visited the complainant's president and re-stated that the erection of the tanks was boilermakers' work and that a picket line would be established. On June 20, 1980, Mobil requested the complainant to cease working on the erection of the tanks until the dispute over the performance of such work was settled. The complainant had not worked on its contract with Mobil from June 20 until June 30, the date of the hearing of this complaint. On June 23, 1980, a picket line was again established for the beginning of the working day.

6. During the existence of the picket lines the subcontractors' tradesmen refused to cross it and perform the work which had been scheduled for them. The Board finds that the

Boilermakers and Boilermakers Local 128 carried out their declared intention of setting up picket lines as a result of the complainant's assignment of the work of erecting the tanks to members of Local 721. The Board finds that a strike was imminent or was taking place by reason of the assignment of work within the meaning of section 81(8) of the Act. There was no evidence before the Board with respect to whether the strikes which were engaged in by the subcontractors' tradesmen were lawful or unlawful. Section 81(8) refers to a strike and does not differentiate between lawful and unlawful strikes. While it is the Board's experience that strikes which arise by reason of the requirement as to the assignment of work or by reason of the assignment of work are usually unlawful strikes, the Board's jurisdiction under section 81(8) is not restricted to the imminence or occurrence of unlawful strikes. Complaints which arise under section 81 are usually independent of the process of collective bargaining and the purpose of section 81 is to provide for methods of resolving conflicts between trade unions which arise as a result of competing claims for work during any part of the cycle of collective bargaining.

7. Although the complainant requested a cease and desist direction under section 81(9) of the Act, the Board did not issue such a direction when all of the parties to this complaint gave their undertakings to abide by the terms of the interim order.

0102-79-U Angelo Mallozzi, Complainant, v. Dominion Bridge Company, Limited, Respondent.

Discharge for Union Activity – Employee – Section 79 – Employer discharging foreman – Foreman previously employed in bargaining unit – Active as union steward when in unit – Seeking return to unit after termination – Alleging union activity as cause for employer's refusal to hire – Whether Board has jurisdiction

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J. A. Ronson and S. Lewis.

APPEARANCES: *George Schnall for the applicant; John P. Sanderson, Q.C. and Joe Keyes for the respondent.*

DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN, AND BOARD MEMBER S. LEWIS; July 9, 1980

1. The name "Dominion Bridge Co. Ltd." appearing in the style of cause of this complaint as the name of the respondent is amended to read: "Dominion Bridge Company, Limited."

2. This is a complaint filed under section 79 of *The Labour Relations Act* in which it is alleged that the complainant, Mr. Angelo Mallozzi, has been dealt with by the respondent contrary to the provisions of section 58(a) of the Act. The complainant alleges that on or about April 4, 1979 he was terminated from his employment as a foreman with the respondent com-

pany "because of his vigorous union activities when he was president of the union before being requested by the respondent to assume the foreman's position."

3. Mr. Mallozzi commenced employment as a bargaining unit employee of the respondent in March, 1972. He joined the trade union representing the employees of the respondent, participated in its activities, and eventually, was elected president of the union. It is not disputed that he actively and aggressively participated in trade union activity during his tenure as union president. Mr. Mallozzi was promoted out of the bargaining unit in January, 1978 and acted as a foreman from that time until April 4, 1979 when his employment was terminated. It is admitted that while occupying a foreman's position, Mr. Mallozzi was in charge of the day shift, was not covered by the collective agreement between the company and trade union and exercised managerial authority within the meaning of section 1(3)(b) of the Act. When he was told that his employment was being terminated, Mr. Mallozzi asked to be returned to the plant as a bargaining unit employee. His request was denied. The relief sought by Mr. Mallozzi is reinstatement as a bargaining unit employee in the plant.

4. The status of Mr. Mallozzi as an employee exercising managerial authority within the meaning of section 1(3)(b) of the Act at the time of his termination raises an issue as to whether or not Mr. Mallozzi is covered by the protections afforded under section 58(a) of the Act. The parties were agreed that the Board should entertain submissions with respect to this preliminary issue and decide the preliminary matter before proceeding to hear the merits.

5. The respondent takes the position that the Board has no jurisdiction to hear the complaint since the complainant is not an "employee" for purposes of *The Labour Relations Act*. The respondent cites the decision of the Supreme Court in *Barbara Jarvis v. Associated Medical Services*, [1964] S.C.R. 497, 44 D.L.R. (2d) 407 (the Board proceedings are reported in (1961), 61 CLLC ¶16,218), the *George Scarpellin* case, [1970] OLRB Rep. Jan. 1238, *Ottawa General Hospital* case [1974] OLRB Rep. March 193 and Oct. 714 and *The National Protective Service Co.* case, [1975] OLRB Rep. April 394 in support of its position that the complainant in this matter is not covered by the provisions of section 58 of the Act and is without standing to press a complaint brought under section 79 of the Act alleging violation of section 58(a). The respondent takes the position that the decision to terminate and the decision not to allow Mr. Mallozzi to return to the plant as a bargaining unit employee were made simultaneously and cannot be separated. The respondent argues that it had to decide whether to terminate Mr. Mallozzi as an employee or reassign him to the bargaining unit. It took the former decision and because of Mr. Mallozzi's managerial status the company maintains that the Board had no jurisdiction to entertain the complaint. The respondent argues that the Board addressed this very question in the second *Ottawa General* case, *supra*, and decided that under *The Labour Relations Act* a managerial person could not compel the continuation of his employment.

6. The complainant argues that on the plain meaning of section 80 of the Act, a section enacted subsequent to the *Barbara Jarvis* judgment, any person, whether exercising managerial authority or not, is entitled to a hearing on the merits and relief in respect of a successful complaint under section 79 of the Act alleging a violation of section 58 of the Act. The complainant argues in the alternative, that the protection afforded a union member under section 58 carries with him after he leaves the bargaining unit and, if it is subsequently alleged that he has been discharged because of his previous union activities, a complaint filed under section 79 alleging a violation of section 58 must be heard by the Board. The complainant also argues

that once having promoted an employee out of the bargaining unit a company is estopped from arguing that the employee is without the protections of the Act. The complainant asks the Board to assert jurisdiction and hear the complaint on its merits.

7. The relevant sections of the Act are:

“1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

58. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

79. (4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of contravention of this Act and where the Board is satisfied that an employer, employers’ organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers’ organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto . . .

80. For the purposes of section 71 and any complaint made under section 79, ‘person’ includes any person otherwise excluded by subsection 3 of section 1.”

8. The issue before the Board centers on the meaning of the word ‘person’ in section 58(a) of the Act. More specifically, the issue is whether a person who is not an employee for purposes of the Act and who is expressly excluded from the operation of the Act is entitled to the protections extended under section 58 and remedial relief under section 79. This is not the first time that this issue has come before the Board. In the *Barbara Jarvis* case, *supra* the Board found that the termination of Barbara Jarvis was in violation of section 50 of the Act (now section 58) and notwithstanding the fact that she exercised managerial authority within the meaning of the Act, ordered her reinstatement pursuant to its authority under section 65 (now section 79). On review the Supreme Court ruled that a construction of the Act giving the Board the power to compel the continuation of employment of persons exercising managerial functions is at variance with the purpose of the Act as a whole, and upheld an appeal from the Board’s decision. The court ruled that persons not entitled to join a trade union and participate in its lawful activities were not covered by the protections afforded under the then section 50 of the Act and were not entitled to remedial relief under the then section 65 of the Act.

9. Section 80 was enacted following the judgment of the court in *Barbara Jarvis, supra*. It was put to the Board in the *Ottawa General Hospital* case (No. 1), *supra*, that section 80 “reversed” the court’s judgment in *Barbara Jarvis, supra*, and extended the meaning of the word ‘person’ in both section 79 (formerly section 65) and section 58 (formerly section 50) to include “any person otherwise excluded by subsection 3 of section 1” of the Act. The Board concluded in the *Ottawa General Hospital* case (No. 1) *supra*, that if the Legislature had intended to change the meaning of the word ‘person’ in section 58 it would have expressed its intention in much clearer language than appears in section 80 and confirmed that a person exercising managerial authority cannot invoke section 79 of the Act to allege a violation of section 58. The Board went on to conclude that section 80 enabled a managerial person to invoke section 79 if covered by some substantive provision of the Act other than section 58 and left open for argument the question of whether section 61 of the Act applies to managerial persons.

10. In a subsequent application for reconsideration, the Board, in the *Ottawa General Hospital* case (No. 2), *supra*, addressed the question of the application of section 61 of the Act to persons exercising managerial functions. The Board reasoned at para. 31 of its October reconsideration as follows:

“The fundamental premise of the complainant’s argument is that a managerial person is free to join a trade union and to participate in its lawful activities (section 3 of the Act) and that that right is protected by section 61. Where, precisely, does that argument lead? Did the Legislature intend to confer upon a managerial person a protectable right to join an organization which has no legally enforceable right to represent him in collective bargaining? Does it follow, if the complainant’s argument is accepted, that a managerial person can hold elective office in the union, participate in bargaining on its behalf, vote in ratification and strike votes, and, where the law otherwise permits, join in strike action with other members of the union? We prefer a construction of the statute which avoids these questions.”

The Board determined that a person exercising managerial authority is not protected by section 61 of the Act.

11. The Board’s decision in *A.A.S. Telecommunications Ltd.*, [1976] OLRB Rep. Dec. 751 completes the framework for our analysis. In that case the Board had before it a complaint filed by a trade union alleging that the dismissal of three employees constituted a violation of the Act. It was argued that one of the persons who had been dismissed exercised managerial authority and was not entitled to the protections of the Act. Assuming the person to be managerial, the Board recognized the limiting effect of the court’s judgment in *Barbara Jarvis, supra*, as confirmed in the *Ottawa General Hospital* case (No. 1) *supra* and described the interaction of section 80 upon both the substantive and remedial provisions of the act in the following terms:

“Managerial employees, however, are not left completely unprotected by *The Labour Relations Act*. A limited protection has been extended to this group of persons by section 80. The Board had held that section 80

not only extends to the managerial employee remedial protection where there has been a violation of section 71, but remedial protection where there has been a violation of any other provision of the Act. (See *Ottawa General Hospital* (No. 1), *supra*.) This protection, however, is much more narrow than might appear from the face of this proposition. The important limitation is that there must be a violation of a substantive provision of the Act before any remedial relief is available to the managerial employee, raising the question of the extent to which the managerial employee falls within the substantive protections of the Act.”

The Board concluded that the relative substantive sections of the Act did not extend to cover persons exercising managerial authority. However, the Board found that the dismissal of all three employees (including the one exercising managerial authority) constituted unlawful interference with the trade union, within the meaning of section 56 of the Act, and relied on section 79(4) (as enacted in 1975) which allows the Board to extend relief to both unions and employers as well as individual employees. In framing a remedy directed to the union (and not to the managerial employee who benefited incidentally) the Board ordered the managerial employee reinstated, not to her former employment, but into the bargaining unit.

12. Having reviewed the jurisprudence in light of the amendments to the Act which have been made since *Barbara Jarvis*, *supra*, we reject the submission of the complainant as to the effect of section 80 of the Act. While section 80 extends the remedial authority of the Board to encompass managerial employees, it does not broaden the meaning of the word ‘person’ in section 58 of the Act as limited by the judgment of the court in *Barbara Jarvis*, *supra*. The Board, applying essentially the same reasoning as the court in *Barbara Jarvis*, determined in the *Ottawa General Hospital* cases, *supra* that the substantive provisions of sections 58 and 61 do not extend to cover managerial employees. The expansion of the Board’s remedial authority under section 80 of the Act, therefore, is circumscribed by the decision of the Legislature and to extend certain key substantive protections to managerial employees.

13. Mr. Mallozzi exercised managerial authority at the time he was terminated from employment and hence the protections under section 58 of the act do not apply to him in respect of termination from his managerial position. Indeed, so long as he continued as a managerial employee he had no rights under section 58 of the Act vis-a-vis the treatment afforded him by his employer. The Board, therefore, is without jurisdiction to deal with his complaint insofar as it pertains to his termination as a foreman. This is not a case in which the union complains that the action of the company in promoting and then terminating a former union president constitutes a violation of section 56 as would allow the Board to approach the termination of Mr. Mallozzi from the same perspective as in *A.A.S. Telecommunications*, *supra*.

14. However, this is not the end of the matter. Depending upon the level of production, vacation schedules, an individual’s supervisory abilities and a host of other related factors, employees regularly shift back and forth between the bargaining unit and first line supervisory positions. More often than not bargaining unit employees who are moved into first line supervisory positions are long-service employees with a proven record and attachment to the trade union. It is one thing to say that they are without the protections of sections 58 and 61 of the Act should they be terminated from a managerial position. It is quite another matter to say that they are without these protections should the employer refuse to return them to the bar-

gaining unit or consider preferential status for re-employment into the bargaining unit. We do not accept that the removal of an employee with proven competence in the bargaining unit from a supervisory position and the refusal to return that employee to the bargaining unit, are part and parcel of an inseparable decision. In our view, an employer must put his mind to two separate questions. He must ask himself if he wants the employee to continue in his managerial position and having come to the conclusion that he does not, he must then decide if he is going to return the employee to the bargaining unit (assuming that a vacancy exists) or terminate his employment altogether.

15. Section 58 of the Act makes it an offence to refuse to continue to employ a person (who is already an employee for purposes of this Act) and to refuse to employ a person who is seeking to become an employee for anti-union reasons. The reasoning of the Court of Appeal in the *Barbara Jarvis* case as adopted by the Supreme Court bears repeating. In reference to the meaning of the word 'person' in section 50 (now section 58) the Court held:

"To employ or continue to employ a person is for the purposes of the Act, to cause a person to become an employee or to continue a person as an employee. The section refers to two classes of individuals – a person who seeks employment, i.e. who seeks to become an employee and a person who already is an employee. This meaning of the word is quite in keeping with the general object and purpose of the Act; on the other hand it is neither logical or necessary to construe 'person' as it appears in the section as applying to anyone other than an individual seeking to become an employee or who already is an employee and we are told in plain terms by sec. 1(3)(b) of the Act that someone working in a managerial capacity is not, for the purposes of the Act to be considered an employee."

A person exercising managerial authority within section 1(3)(b) of the Act is without a substantive right under section 58 to challenge his removal from a supervisory position. In our view, however, once the decision has been made to remove the employee from the managerial position he holds he is no longer employed in a managerial capacity within the meaning of section 1(3)(b) of the Act. Can it be said, therefore, that when he requests a return to the bargaining unit (having been promoted from the bargaining unit) he is in a lesser position vis-a-vis the protections afforded under section 58 than a person who applies off the street? We think not.

16. It is clear on a reading of the judgement of the Supreme Court in *Barbara Jarvis*, *supra*, and the subsequent decisions of the Board that the restrictive interpretation given the word "person" in section 58 and section 61 is designed to preserve the integrity of the collective bargaining process as an exercise engaged in by employees represented by trade unions on one side and employers, in the person of those exercising managerial functions, on the other. A managerial employee has no right under the Act to compel his continuation in employment as a managerial employee. While the Supreme Court has made it clear that a managerial employee can not compel his continuation in employment as a managerial employee, a reading of the court's decision in *Barbara Jarvis*, *supra*, makes it equally clear in our view that a person who no longer exercises managerial function is entitled to the protections of section 58 in respect of any attempt to secure employment within the bargaining unit following an employer's decision to remove him from his managerial position. The considerations upon which the restrictive interpretation relied upon by the respondent is based, do not prevail in respect of a person who has been removed from a managerial position and claims that a subsequent refusal

of the company to return him to the bargaining unit is in violation of the Act. Regardless of the bona fides of the employer's original decision to promote the employee, the employer, having decided to remove the employee from his managerial position, cannot discriminate in respect of a refusal to return the employee to the bargaining unit. On a reading of section 58(a) of the statute as interpreted in *Barbara Jarvis, supra*, such a person is clearly a person seeking to become an employee within the meaning of the Act and is therefore covered by the protections extended by the section 58(a) prohibition against refusing to employ a person for anti-union reasons.

17. Having regard to all of the foregoing, it is our determination that the protections of section 58 of the Act do not extend to the removal of Mr. Mallozzi from his managerial position but that these protections do extend in respect of the company's refusal to return him to the bargaining unit. Accordingly, we are prepared to hear evidence and entertain submissions in respect of Mr. Mallozzi's complaint that "the respondent refused to allow him to return to the plant because it did not wish (him) to once again undertake union activities in his diligent and conscientious fashion."

DECISION OF BOARD MEMBER J. A. RONSON:

1. Mr. Angello Mallozzi was a foreman employed by the Respondent Company. On or about April 4, 1979 the Company terminated his employment for cause. It was agreed by the parties that, as a foreman, Mr. Mallozzi was not an "employee" within the meaning of that term as defined in the Act.

2. The present narrow issue before the Board is whether Mr. Mallozzi is entitled to ask the Board to order that he be reinstated as an employee by the Company. He has filed a complaint under section 79 of the Act alleging a breach of section 58(a). He alleges that the Company, for anti-union reasons, chose to terminate his employment rather than demote him back into the bargaining unit. There is no allegation that, within the terms of the collective agreement in effect, Mr. Mallozzi is entitled to preferential treatment in securing a job in the bargaining unit.

3. The Board is being asked to adjudicate on the disciplinary penalty meted out to a managerial employee. Rather ingeniously, counsel for the Applicant submits that the decision of the Company can be divided into two components:

- (1) a decision to remove Mr. Mallozzi from his managerial position,
and
- (2) a decision to terminate his employment.

It was submitted that the Board has jurisdiction to entertain a complaint under section 58(a) of the Act with respect to the second component of the decision.

4. I would have thought the Supreme Court of Canada in the *Barbara Jarvis* case, *supra*, and subsequent decisions of the Board had laid the issue to rest. In *Barbara Jarvis* the majority decisions of the Court explicitly endorsed the reasoning of the Court of Appeal for Ontario. In the Court of Appeal decision (63 CLLC 631) (written by Aylesworth J.A) there is the following:

“Much was said during the argument as to whether or not under the Act, persons other than those deemed to be employees for the purpose of the Act, had “rights” conferred upon them. Interesting as this may be, nothing in the present proceedings requires determination of the point. The board either had jurisdiction to adjudicate upon the complaint or it did not and if, as in my opinion is the case, it had no jurisdiction to determine the complaint, then it cannot, of course, concern itself with whether or not the discharge can be justified.”

and:

“Once the Board determined, as it had the right to determine, that the complainant was a person deemed not to be an employee for the purposes of the Act it had, *ipso facto*, demonstrated its lack of jurisdiction to proceed further with the complaint. The remedy, if any, of the complainant lies in another forum.”

5. The Board again considered the problem in *Ottawa General Hospital (No. 2)*, *supra*, and in its reasons stated:

“We are inclined to the view that counsel’s reading of the majority decision of the Supreme Court of Canada in *Jarvis* is too narrow in that it fails to give effect to the following passage in the judgment of Cartwright, J. (Taschereau C.J.C., Fauteux, Martland and Hall, J.J. concurring):

‘It appears to me that the appeal can succeed only if we are able to construe the Act as giving the Board power, in appropriate circumstances, to compel the continuation of the employment not only of all persons who are “employees” within the meaning of that term as defined in the Act but also of all persons exercising managerial functions.

In my opinion such a construction would be at variance with the purposes which appear from reading the Act as a whole, and would involve giving a forced meaning to the words which the legislature has employed.’

It is true that the court was considering the ambit of section 50 [now section 58] of the Act and not section 61. However, as appears from the passage quoted, the court was construing the Act as a whole; no exceptions or qualifications are indicated. If, in its construction of the whole Act, the court had concluded that a managerial person could, under some circumstances, compel the continuation of his employment, it surely would have said so. However, even if we are wrong in our understanding of the scope and effect of the court’s decision in *Jarvis*, we cannot accept the interpretation of section 61 for which the complainant contends.”

6. We are asked in this case to treat Mr. Mallozzi as if he wore two hats while he was being discharged:

- (a) he was a managerial person until he was told he was being removed from the position of foreman, and
- (b) immediately upon being so told he became a person deemed to be an employee under the Act and entitled to ask for an order compelling the continuation of his employment.

Implicit in this approach is the premise that when he was terminated as a manager, he was also terminated or refused employment as an "employee" under the Act.

7. The result of accepting such an argument is to say that in a section 58(a) complaint brought by an individual "in appropriate circumstances the Board has power to compel the continuation of employment not only of all persons who are 'employees' within the meaning of that term as defined in the Act but also of all persons exercising managerial functions". In the *Barbara Jarvis* case the Supreme Court of Canada has said that such a construction would be at variance with the purposes of the Act and would give a forced meaning to the words which the legislature has employed.

8. Mr. Mallozzi was dealt with in his capacity as a managerial person. The Board has no jurisdiction to entertain the merits of his complaints under section 58(a) of the Act.

0150-79-R; 0153-79-R; 0073-80-R; 0074-80R Hotels, Clubs, Restaurants, Tavern, Employees' Union, Local 261, Applicant, v. **Fuller's Restaurant**, Respondent, v. Group of Employees, Objectors.

Certification – Practice and Procedure – Reconsideration – Original order quashed by court – Board referring matter to another panel of Board – Employees seeking reconsideration of decision to continue certification proceedings

BEFORE: George W. Adams, Chairman, and Board Members J. D. Bell and W. F. Rutherford.

DECISION OF THE BOARD; July 4, 1980

1. This is an application for reconsideration of the Board's decision dated June 2, 1980 wherein it was determined that two applications for certification were still before the Board subsequent to a successful application for judicial review brought on behalf of certain objecting employees. The Board had certified the applicant trade union for both a full-time and part-time bargaining unit after having ruled that the objecting employees had not filed timely statements of objection in the proper form. The Supreme Court of Ontario quashed the Board's decision on the basis that the Board had improperly refused to hear the objecting employees in light of the Board's own rules of procedure. The Court did not specifically remit the matters back to the Board, but subsequently the applicant trade union requested the Board to process the two applications. The objecting employees and respondent company challenged the

Board's right to do so and, after entertaining the submissions of all affected parties on this one issue, this panel concluded that the Board was obligated in law to act on the applicant's request. The objecting employees seek reconsideration of this decision.

2. The first ground for reconsideration is that the Board should have sought instruction or advice from the Court before making its decision of June 2, 1980 and "that by assuming jurisdiction it has sat in an appellate capacity upon a decision of the Supreme Court of Ontario." There is no basis to this submission in our view. The decision of the Supreme Court of Ontario did not strike the two applications for certification from the Board's docket. The trade union and the employees supporting it were not responsible for the error brought before the Court and, that error having been corrected by the Court, the Board is obligated to process the two outstanding applications.

3. The second ground for reconsideration is that the Board improperly relied on a decision of the Nova Scotia Supreme Court, Appeal Division, in the *Little Narrows Gypsum Co. Ltd.* case (1978), 82 D.L.R. (3d) 693. Counsel suggests that the Board ignored important portions of this decision and in so doing reinforced the views of the objecting employees that they cannot receive a fair hearing before the Board. We cannot agree. The Board extensively canvassed the reasoning of that judicial opinion in its June 2, 1980 decision and concluded that the earlier error of the Board did not show an ongoing predisposition to exercise its jurisdiction unjudiciously. Indeed, out of an abundance of concern for the views expressed on behalf of the objecting employees, we indicated that a differently constituted panel of the Board would hear the two applications for certifications.

4. The third submission for reconsideration is that the Board on the basis of the *Little Narrows Gypsum* case, ought not to hear "new evidence" in continuing to process the two outstanding applications. We cannot agree. The decision of the Supreme Court of Ontario obligates the Board to entertain the evidence and submissions of the objecting employees. In the instant applications the few determinations of the Board preceding the point where the objecting employees should have been heard were uncontested and, procedurally, occupied the space of a few minutes. The remainder of the applications do have to be heard by the Board once again with the full participation of the objecting employees. This is the essence of the Supreme Court's decision and it is a responsibility that, in our view, is best handled by a freshly constituted panel of the Board.

5. The fourth ground for reconsideration is based on the submission that the objecting employees are prejudiced by the Board continuing to process the two applications because the passage of time since the matters were initially processed by the Board has, counsel submits, made it almost impossible for them to adduce the evidence necessary to establish the "bona fides" of the petition. It is our view that this is a submission that should be made to the panel that will hear the two applications and the evidence of the objecting employees. The passage of time would be a proper factor for that panel to take into account in assessing the evidence submitted on behalf of the employees. We would also point out that the applicant trade union and its supporters are also affected by the passage of time. It is a situation that all the parties must cope with and, as we have pointed out, may be the basis of submissions to the panel hearing the applications. Indeed, the passage of time may, in the circumstances, cause that panel of the Board to exercise its discretion and order a representation vote. But that is a decision for the panel to make in light of all the evidence and the parties' submissions. This panel of the Board in its decision of June 2, 1980 dealt only with the narrow legal question of whether the two ap-

plications for certification were still before the Board as a matter of law as the applicant trade union had submitted they were. The fact that all the parties will be burdened by the cost of a further hearing is unfortunate but unavoidable in the circumstances. To simply refuse to entertain the applications on this basis would cause the applicant trade union to complain about costs it had incurred in bringing the two applications in the first place on the assumption that they would be effectively disposed of one way or the other.

6. The fifth ground is that the applicant trade union abandoned its applications by filing two subsequent applications. However, these two later applications were filed in the alternative to its request that the Board process the earlier matters and so there is no basis to this submission.

7. The final submission related to purported statements of counsel made before the Supreme Court of Ontario on the issue of whether the matter ought to be remitted back to the Board. We would point out that there was no consensus between all counsel before this panel on these recollections and, in the circumstances, we are of the view that the decision of the Supreme Court of Ontario should "speak for itself" against the backdrop of administrative law principles argued by the parties. No evidence was adduced before this panel on the point. We did not intend to imply that counsel misled the Board in this respect.

8. For all of these reasons, the application for reconsideration is dismissed and the Registrar is to act on the Board's decision of June 2, 1980 as directed.

**0652-80-M International Union of Operating Engineers, Local 793,
Applicant, v. H. Kerr Construction Limited, Respondent.**

Adjournment – Construction Industry – Section 112a – Collective agreement under which grievance filed arising from certification – Decision granting certificate subject of reconsideration application – Whether adjournment appropriate

BEFORE: D. E. Franks, Vice-Chairman, and Board Members C. A. Ballentine and J. A. Ronson.

APPEARANCES: *Jack Redshaw and Bernard McMillan for the applicant; R. A. Werry, G. Weir and W. Kerr for the respondent.*

DECISION OF D. E. FRANKS, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; July 21, 1980

1. This is a grievance referred to the Board under section 112(a) of *The Labour Relations Act*.

2. At the commencement of the hearing in this matter counsel for the respondent employer requested an adjournment pending the disposition of a request for reconsideration of a

certification case involving the respondent employer. (Board File 1473-78-R.) The applicant does not consent to such an adjournment.

3. Both the applicant and the respondent in this matter agree that any collective agreement which might exist between them arises by operation of *The Labour Relations Act* as a consequence of the certification in Board File 1473-78-R. That is, there is no specific signed document which is claimed as a collective agreement.

4. Another panel of this Board issued the decision in Board File 1473-78-R in December 1978. No request for reconsideration was made until July 8, 1980, the day prior to the hearing in this case, notwithstanding that this case was filed on June 24, 1980. While we are concerned about the time when this matter arose, it is clear that the issue raised by the reconsideration request goes to the jurisdiction of this Board to hear the referral of the grievance in question.

5. Noting the undertaking of counsel for the respondent to proceed with the reconsideration of Board File 1473-78-R as expeditiously as possible, this case is adjourned pending the resolution of the reconsideration proceedings in Board File 1473-78-R.

DECISION OF BOARD MEMBER C. A. BALLENTINE:

1. I have no hesitation in strongly disagreeing with the decision majority of the Board to grant the respondent an adjournment of these proceedings.

2. It has been long standing policy and practice of this Board not to grant an adjournment of a hearing unless all the parties to the proceeding consent to the adjournment or unless there are exceptional circumstances beyond the control of the party seeking the adjournment. This policy and practice is particularly important in Section 112a proceedings. One of the purposes of Section 112a is to provide a speedy resolution of grievances arising under construction industry collective agreements. In my view, the decision of the majority in this case is contrary to the Board's practices and is an invitation to employers who seek to delay Section 112a proceedings to use the majority's decision as a way of achieving that goal.

3. Counsel for the respondent in this case was the same counsel who acted on behalf of the respondent in the certification proceedings which are now subject to the reconsideration. At the time of certification there was no suggestion by the respondent that the application for certification was not properly in the construction industry nor did the respondent request a hearing before the Board of the application for certification.

4. In the case presently before the Board, the respondent chose to wait until the day before the hearing which had been scheduled fourteen days earlier, to file an application for reconsideration of the 1978 decision granting the trade union certification.

5. In my opinion the Board ought to have proceeded with the merits of the grievance rather than await a determination on the application for reconsideration. The certificate remains in effect, and there is a collective agreement presently in force between the parties as a result of the operation of *The Labour Relations Act*. Surely it would have been better for this panel to have proceeded with the arbitration. If the applicant was successful in its application for reconsideration of the Board's certificate, that determination could be raised before this

panel on reconsideration. In my view, to adjourn the Section 112a proceedings pending an application for reconsideration of a decision made more than nineteen months earlier is not justified.

6. I would have refused the request for an adjournment and proceeded to hear the matter on the merits.

033-80-R Labourers' International Union of North America, Local 183, Applicant, v. **I. M. Pastushak Ltd.**, Respondent, v. Group of Employees, Objectors.

Petition – Crew Chief originating and circulating petition – Employee reasonably concluding that employer becoming aware of employee's wishes – Petition not voluntary.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *B. Fishbein and T. Spada for the applicant; Howard Isenberg, Stan Sherr and I. M. Pastushak for the respondent; Ken Hutchinson and Terry H. Wilson for the objectors.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER C. A. BALLENTINE; July 25, 1980

1. This is an application for certification. Although originally filed as a construction industry application, at the hearing the parties agreed to have the Board treat the application as if it had been made pursuant to the regular provisions of the Act.

2. We find that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. Having regard to the agreement of the parties, we further find that all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, those above the rank of party chief, draftmen, and sales, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. On the date of the making of the application, the respondent employed two employees in the bargaining unit. The applicant filed evidence of membership with respect to both of these employees which indicates that each had applied to become a member of the union and in connection therewith had made a dollar payment to the union. Having regard to the definition of a union "member" set out in section 1(i)(j) of the Act, we are satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 23, 1980, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of *The Labour Re-*

lations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said *Act*.

5. There was filed a statement of desire in opposition to the application signed by Mr. K. Hutchinson a party chief outside of the bargaining unit and by Mr. T. Wilson, an employee in the bargaining unit. Although the applicant eventually agreed to exclude party chiefs from the bargaining unit, initially it proposed that they should be included in the unit and it filed membership evidence on behalf of Mr. Hutchinson.

6. Prior to the respondent being formally notified of any application for certification, Mr. Hutchinson informed the respondent's owner, Mr. I. Pastushak that such an application would be forthcoming. Mr. Hutchinson subsequently advised Mr. Wilson that he had given this information to Mr. Pastushak. After the posting of the notice formally advising employees of the application, Mr. Hutchinson sought to discuss the possibility of a statement of desire with Mr. Pastushak. Mr. Pastushak, however, declined to discuss the matter, saying only that the men would have to make up their own minds. The statement of desire was drafted and signed by Mr. Wilson and Mr. Hutchinson on the afternoon of Friday, May 23, 1980. In cross-examination, Mr. Hutchinson indicated that during the morning of the same day he had advised Mr. Pastushak that such a statement would be filed. Mr. Hutchinson indicated that he had probably advised Mr. Wilson that he had given this information to Mr. Pastushak.

7. Mr. Wilson and Mr. Hutchinson together agreed on the wording of the statement of desire on the afternoon of May 23rd. The statement was written out by Mr. Hutchinson, and he was the one who forwarded it to the Board.

8. As party chief, Mr. Hutchinson is a working member of a survey crew who directs the operation of the crew. He makes reports on employee job performance to the respondent. He testified that with the possible exception of "extreme circumstances" he could not suspend an employee. Mr. Wilson generally does not work in Mr. Hutchinson's crew, but he was doing so at the relevant time. Mr. Wilson testified that he was not influenced into signing the statement by Mr. Hutchinson, but rather, signed because he had changed his mind about union representation.

9. The Board has a practice of accepting statements of desire such as the one now before us and on the basis of such a statement exercising its discretion under section 7(2) of the *Act* to direct the taking of a representation vote, notwithstanding the fact that an applicant has filed evidence of membership on behalf of more than fifty-five per cent of the employees in the bargaining unit. Before it will exercise its discretion in this manner, however, the Board must be satisfied that the apparent "change of heart" on the part of those employees who applied to become members of the union and shortly thereafter signed a statement against the union, in fact, represented a truly voluntary change of heart. Having regard to the sensitive nature of the employer-employee relationship, the Board had consistently declined to direct a representation vote under circumstances where employees would have been reasonably concerned that any failure on their part to sign a statement of desire would be made known to management.

10. In the instant case, the only bargaining unit employee to sign the statement was Mr. Wilson. Mr. Wilson testified that he did so because he no longer supported the union. However, Mr. Wilson signed the statement only after discussions with Mr. Hutchinson, the party chief. Mr. Hutchinson at the time was the person who directed Mr. Wilson in his duties, and

was responsible for reporting on his job performance to senior members of management. Mr. Hutchinson informed Mr. Wilson of his approaches to Mr. Pastushak concerning the union, including his mentioning to Mr. Pastushak that a statement of desire would be filed. In light of Mr. Hutchinson's supervisory position, and his contacts with Mr. Pastushak concerning the union and the statement of desire, we are satisfied that Mr. Wilson would reasonably have concluded that his decision to sign or not to sign the statement against the union would become known to his employer. In these circumstances, and given the nature of the employee-employer relationship, we are unable to conclude that Mr. Wilson was not motivated by a concern as to how his actions might be viewed by management. In the result, we are not prepared to exercise our discretion to direct the taking of a representation vote.

11. A certificate will issue to the applicant.
12. The decision of Board Member H. J. F. Ade will be forthcoming at a later date.

**1297-79-U Robert Pharand, Peter Digiglio and John Tolin et al,
Applicants, v. Inco Metals Co., Respondent.**

**Health and Safety – Group of employees refusing work – Steps for proper refusal followed
– Whether group action permissible – Whether refusal reasonable – Relevant principles reviewed**

BEFORE: M. G. Picher, Vice-Chairman and Board Members D. B. Archer and J. A. Ronson.

APPEARANCES: *Norman Carriere for the applicant; H. A. Beresford, D. D. Sheehan and E. W. Hodkin for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER D. B. ARCHER; July 10, 1980

1. On September 3, 1979 twelve employees of Inco Metals Company (hereinafter referred to as "Inco") were sent home for refusing to perform work which they alleged was unsafe. Disciplinary notations were subsequently placed in their records. The employees have complained under section 9 of *The Employees' Health and Safety Act, 1976*, S.O. 1976, c. 79 alleging that Inco acted contrary to the Act by imposing discipline upon them and effectively suspending them for part of a day because they invoked the protection of the Act.

2. The Act, which the Board will examine in greater detail below, gives an employee who has reasonable cause to believe that working conditions are unsafe the right to refuse to work. An employer may not discipline nor threaten to discipline an employee for taking such action so long as the employee's refusal to work conforms to the conditions of the Act.

3. The twelve grievors are employed in Inco's copper refinery at Coppercliff. They work in the Anode Department where the refining and casting of copper is done. Three large anode furnaces are the centerpiece of that department. Shaped roughly like a loaf of bread en-

cased in a steel frame, each of the furnaces has an interior space of fifty-one feet by seventeen feet. The walls and roof of the furnaces are made of heavy duty refractory brick designed to withstand the heat generated inside the furnaces by large gas-fired burners.

4. To appreciate the facts of this grievance it is necessary to briefly review the refining process in the grievors' place of work. The first stage of the refining process in a furnace is the charging cycle. Two kinds of material are put into the furnace during charging. The first material introduced is solidified copper in various shapes and forms, commonly referred to as cold charge. As the cycle progresses, eventually hot metal, or blister copper, transferred by rail from the Coppercliff smelter is placed in the furnace to complete the charging cycle. The charging phase generally takes from fifteen to twenty hours. During that time the heat in the furnace builds up and the solid material placed in the furnace is transformed into a molten bath.

5. The next phase of the cycle is the skimming stage. When the copper in the furnace has melted thoroughly, foreign substances rise to the surface as slag. Working from the skim bay, a window-like opening at one end of the furnace, the furnace crew remove the slag from the surface of the bath with a long hoe-like instrument.

6. When skimming is complete the furnace crew proceed to the most violent stage of the refining cycle, the poling phase. At this point large green logs, usually maple, are inserted into the bath through the skim bay door for up to two-thirds of their length. By a fulcrum the long end of the pole is then submerged into the molten metal. The purpose of inserting green logs into the bath is to deoxidize the metal. That process releases tremendous amounts of energy and the furnace fills with smoke and flame. If, as sometimes happens, a log has a pocket of snow or water within it there may be a violent explosion that can, on occasion, damage the walls or roof of furnace. The poling stage normally takes from 6 to 8 hours and can involve between eight and fifteen logs.

7. The final stage in the cycle of a copper anode furnace, the stage during which the events of this complaint took place, is the casting stage. At this stage the furnace is drained as the molten copper is poured into molds which become the anodes in the electrolytic process. Casting takes place on the opposite side of the furnace from the large doors through which the furnace is charged. During this phase of the process poling is complete and the copper bath in the furnace is still and quiet. During casting molten copper comes out of the furnace through a vertical slit known as the tap-hole. The metal flows into a small pool and then down a short steam-way into a ladle. The ladle, which resembles a large bucket, pours the molten copper into flat rectangular molds that come to the ladle on a large rotating carousel called the wheel. At the point of the wheel furthest from the ladle the copper molds are removed and placed in a cooling tank while empty molds are put back on the wheel in their place.

8. The Board visited the Anode Department to take a view of the casting operation in progress. Clearly the twelve members of a casting crew are involved in a delicate process that requires close teamwork.

9. A key man on the casting team is the tapper. He controls the flow of copper from the furnace to the ladle. Protected by asbestos coveralls, heavy mittens and a face shield, the tapper works next the tap hole, opening and closing it as required. The tap hole is a slit in the side of the furnace approximately 6 inches wide running half way up the wall of the furnace. About

twelve inches thick, during the charging, skimming and poling stages it remains sealed with a putty-like cement. To drain the furnace of its copper the tapper removes part of the cement plug at the top of the slit, thus allowing the copper to flow, like water over a dam, into the trench that takes it to the ladle and molds. As the level of the bath in the furnace falls the tapper chips away as much of the cement seal as is necessary to maintain the desired flow. While at the tap-hole the tapper is, in a sense, like a man standing next to a narrow dam.

10. The large flat wheel which carries the molds to and from the ladle is controlled by the wheelman. He calls the signals for the rest of the crew. Seated on a high platform overlooking the wheel and facing the tap-hole, he monitors the flow of the copper. If the ladle appears to be overly full he signals to the tapper to either slow down or completely stop the flow of molten metal. The tapper will then insert either a brick, to slow the flow, or a larger plug of soft clay into the tap-hole to stop it completely. This process requires concentration and teamwork between the tapper and the wheelman. It also requires almost constant eye contact between them. Their signals have to be visual due to the tremendous noise in the refinery.

11. The wheelman, who controls both the rotation of the wheel and the tilt of the ladle, also acts as a safety watch for the casting crew. Because molten copper explodes violently when it comes into contact with water, the wheelman keeps a constant watch to see that the molds being carried towards the ladle by the wheel are entirely free of water. He also watches for any chance that molten copper might overflow either the trench or the ladle and spill onto any area of the floor where there might be water, as there occasionally is from jets underneath the wheel which spray the molds to cool them. If the wheelman spots either of those conditions he pushes an alarm button, signaling all members of the crew to clear the area.

12. Water emergencies are not an everyday thing. In fact they rarely occur. When they do, however, the danger is enormous. If the molten metal should ever flow out of control and come into contact with moisture on the refinery floor the risk to any employees in the vicinity is extremely high. A serious incident occurred some years ago. A tapper lost control of the flow when the bottom of a tap-hole failed. Some 200 tons of molten copper emptied out of the furnace and onto the refinery floor. All of the employees were forced to evacuate the refinery which filled with heat, smoke and explosions. Processing and handling molten copper is serious and dangerous. As was apparent from the Board's visit to the refinery as well as from the evidence adduced at the hearings, both the company and its employees treat it as such.

13. Against that background we turn to the events giving rise to this complaint. At 10:45 p.m. on August 31, 1979, the charging cycle was begun on anode furnace No. 1. Work proceeded normally until the shift from midnight to 8:00 a.m. on September 2, 1979. That was the grievors' shift. Burt Duckett, the shift foreman detected a hole in the roof of No. 1 anode furnace.

14. The roof of the furnace then had a sprung-arch roof. Shaped like the top of a loaf of bread, it consisted of a canopy of refractory brick, eighteen inches thick, wedged together, not unlike the roof of an igloo. An anode furnace roof has a life expectancy of from three to four years. At the time in question the roof of anode No. 1 was due to be entirely replaced in about a month. In some places, through normal wear and tear, its thickness had been reduced to approximately twelve inches.

15. The tension of the roof was maintained by a number of tie-rods. They attach to a

metal framework at the sides of the furnace and run across the width of the furnace above the roof. The tie-rods allow the tension of the roof to be adjusted as necessary. In addition to the tie-rods there is a network of steel rods running over the top of the roof. These are known as hanging rods. When a hole develops in the roof, something that happens fairly frequently, refractory brick is suspended from these rods and mortared to form a patch as required. When the bricklayers perform patching work in mid-cycle, as they sometimes must, the heat of the furnace is cut back as far as possible. For the copper to stay molten, however, the level of heat has to remain extremely high. Working from planks suspended in the metal work above the furnace the masons must operate very quickly. Because of the extreme heat they are sometimes required to alternate every few minutes. In these circumstances the most they can do is make a temporary patch, pending a more permanent repair when the cycle has ended and the furnace has cooled. The evidence establishes that anode No. 1 was then in its last days as a furnace with a sprung-arch roof. It has since been converted to a new form of roof in which each refractory brick is individually suspended on a metal hanging rod.

16. When the hole developed in the roof of No. 1 anode, at the request of Mr. Duckett, Mr. Thomas L. Prior, Superintendent of Maintenance at the copper refinery, arranged for the bricklayers to come and repair the leak. The repairs were scheduled for the start of the day shift.

17. Flame was leaking through the hole when the day shift foreman, Mr. Christopher Wisson, arrived at work at approximately 7:00 a.m. At that point the furnace was in the skimming stage. When the bricklayers arrived at 8:00 a.m. Mr. Wisson asked them to wait until skimming was complete before making the repairs to the roof. Skimming was completed at 9:00 a.m.. The burners were then cut back as low as possible to permit the patching to be done. It was essential to patch the roof at that time. The hole posed too great a risk to go unrepaired through the violent uproar of the poling stage, which was next in the cycle. By 11:20 a.m. the bricklayers had completed the repair work and the burners were again turned up.

18. The poling phase proceeded without incident for about two hours. Then, around 2:00 p.m. Mr. Wisson was called back to the No. 1 anode by the head furnaceman. At that time, with a pole in the furnace, he was confronted with a large column of flame which extended some twelve feet into the air through the hole which had been patched by the bricklayers. According to Mr. Wisson's testimony the flame extended through the steel work and rods above that part of the furnace. On Wisson's instruction the pole was immediately raised out of the copper bath. That did not solve the problem. The flame continued to pour from the furnace to a height of approximately eight feet. Mr. Wisson then ordered the pole removed from the furnace entirely. That being done the flame subsided sufficiently for the foreman to go up into the area above the furnace to inspect the hole. On an initial inspection Mr. Wisson could not detect a specific hole in the furnace though he could see an area some three feet square that was glowing red.

19. To make a scaffold that would let him get a closer look at the leak Mr. Wisson placed some large planks in the metal framework above the furnace. They immediately caught fire. They were withdrawn, soaked with water and put back in place so that Mr. Wisson could again go back on top of the furnace. Straddling the planks Mr. Wisson then placed, as best he could, sheets of copper over the leak as well as several sheets of refrisel cloth, a fire-proof material. Because he was working in a complex meshwork of steel hanging rods, some of which were so hot that they were sparking and appeared to be oxidizing, it was difficult for him to be

exact or thorough in the placement of either the copper sheeting or the fireproof cloth. By Mr. Wisson's account his efforts were more directed to dispersing the flame than to stopping it entirely. Even before Mr. Wisson came down from the furnace roof the copper sheeting and refrisel cloth which he had placed there were beginning to glow red with heat.

20. Mr. Wisson testified that his purpose was to control and disperse the flames sufficiently to allow the poling cycle to be completed. He did not believe that circumstances justified calling in the bricklayers once again. According to his testimony he had, on other occasions in the past, used this same method to patch leaks in the roof of an anode furnace.

21. With the copper sheets and cloth in place poling resumed. Under the increased heat of the furnace the entire area which the foreman had covered glowed a bright red and the refrisel cloth began to turn white. Flame continued to escape from the area of the leak, though it now was more diffused, leaking to a lesser height from the edges of the patchwork, rather than rising in a single column. When the day shift ended at 4:00 p.m. poling had resumed with the leak in the furnace roof somewhat abated by the makeshift patch.

22. At approximately 8:00 p.m. the furnace was ready to tap. At that point two men on the casting crew, E. Langlois and G. Graham, refused to tap the furnace on the basis that it was unsafe. Those two employees are not grievors in these proceedings. The grievors worked on the ensuing graveyard shift. To fully appreciate the later events, however, it is necessary to examine the events surrounding the initial protest of Langlois and Graham.

23. Both Mr. Langlois and Mr. Graham were members of the Operation Safety, Health and Environment Committee, the first tier of a three tiered joint health and safety committee system responsible for safety in Inco's refinery operating under Article 17.04 of the collective agreement. Mr. Langlois was the tapper on the evening shift.

24. The two employees first expressed their concern about the patch in the roof of the furnace at the very beginning of the shift. They then spoke to the shift foreman, Mr. Earle Jones. Unsatisfied with Mr. Jones' assurances that the roof was safe, the two employees requested that the foreman call in Mr. Prior, the Superintendent of Maintenance. At approximately 5:15 p.m. Mr. Prior spoke with the two employees and observed the furnace roof with them. The employees continued to express their concern that the roof was in an unsound condition and that it might cave in during the casting operation, causing a surge of molten metal at the tap-hole that would risk serious injury both to the tapper and to other members of the casting crew. When Mr. Prior assured the employees that there was no structural danger, they indicated to him that they wanted a further opinion. Mr. Prior suggested that they contact Mr. Wilf Collins, the bricklayer who had done the repair work on the hole earlier in the day. Instead they called Mr. J. Tyynela, an engineer and Safety Inspector with the Ministry of Labour.

25. Mr. Tyynela came to the refinery with Mr. T. Baker, also a Safety Inspector with the Ministry. The two engineers first met privately with employees Langlois and Graham. They then had a private discussion with Mr. Prior, Mr. Cooper and Mr. Jones of the company. During that visit the Safety Inspectors also went to the furnace and examined the roof, both with the employees and the three company officers, although not at the same time.

26. The leak then appeared as a red, glowing hot spot with flame leaking around its

edges. The burners had been cut back and the furnace was still. Because the entire area was covered by the copper sheets and refrisil cloth, neither the employees, the company officials nor the safety inspectors could tell whether any bricks had fallen from the patch into the bath. It appears, however, that some brick had collected in the bath and was visible through the skim bay. It is not uncommon for refractory material to flake off and fall into the furnace during the refining cycle. No firm conclusions could, therefore, be drawn from that. A portion of the roof in the area of the hole was flat. It was, by Mr. Prior's account, "not a good looking roof". Some twenty-four hours later, when the furnace was empty, an inspection revealed a hole of some two and a half feet square at the location of the leak. The evidence is not clear, however, whether the hole had reached that dimension at the time that Mr. Tyynela and Mr. Baker first inspected the furnace. The only thing that is clear is that on the evening shift of September 2, 1979, no one could tell the exact size of the opening, if there was an opening, under the copper sheets and cloth that had been placed over the leak by the day foreman.

27. After examining the furnace with the company representatives first, and then the employees, the Safety Inspectors spoke to Langlois and Graham in a private office. They thereafter met in an office with the two employees and the three company representatives. Langlois and Graham continued to express their concern that the roof could cave in, in whole or in part, causing wave action in the bath that would result in an uncontrollable surge of molten metal at the tap-hole.

28. Mr. Cooper and Mr. Prior then reiterated their opinion that a complete collapse of the roof was extremely unlikely. They said that at most a few bricks might fall from the area of the patch and that this would not cause any substantial wave action in the furnace. Their opinion was based on a considerable amount of experience. Mr. Cooper, the General Foreman in the Anode Department, has some twenty-nine years experience with anode furnaces. Mr. Prior has eighteen years experience in furnaces of the type used in the refinery. Mr. Cooper testified that he could recall seeing a hole in the roof of a furnace as large as six feet in diameter and that there had nevertheless been no overall collapse of the structure. According to Mr. Cooper, the refractory bricks in the furnace roof tend to bind together over time with the intense heat and as a result the roof tends to be extremely firm.

29. The Safety Inspector did not have the knowledge and experience of the company's officers in the workings of anode furnaces. They therefore inquired carefully of both Mr. Cooper and Mr. Prior as their experience and the basis for their opinion that the roof of No. 1 anode furnace was safe. They accepted the view, expressed again in these proceedings by Mr. Cooper, that once the violent poling stage of the refining cycle was complete and the furnace was in the quieter phase of casting, there was no reason to shut the furnace down for roof repairs and no substantial risk to the casting crew. The two safety inspectors then advised Mr. Langlois and Mr. Graham that in their opinion the company's view was justified.

30. When Mr. Langlois again expressed his concern about being splashed by a sudden surge when his back might be turned, Safety Inspector Baker asked him whether he might feel better if a second man were assigned to work at the tap-hole with him. The idea of the second tapper was to ensure that one of the two men could at all times be watching for a surge or spray from the tap-hole with a view to warning the other man. Mr. Langlois was not enthusiastic about that suggestion. The company's own officials testified that they saw no value in it. The Board, having viewed the casting process, is satisfied that if there was any risk of a substantial and sudden surge of molten metal at the tap-hole, placing two men at that location would only

double the risk of injury. In any event, Mr. Langlois agreed to that arrangement. The company, because it did not believe there was any risk, also consented. The Safety Inspectors then advised the company that it must keep two men stationed at the tap-hole at all times until the casting cycle was complete on anode furnace No. 1. With that Langlois and Graham returned to work, although by this time the shift was almost over. It appears that in fact the casting was not begun, save for the making of a slight opening at the top of the tap-hole towards the end of the evening shift. So matters stood when the grievors returned to work.

31. The evidence is clear that the grievors were unsettled by the situation they encountered as they arrived. When their previous shift had ended, some sixteen hours prior, there was a substantial leak of flame from the roof of the furnace. At about the time the grievors had left for home arrangements had been made to cut the burners back and have the bricklayers put in a patch. Now, upon their return, where they might have expected to see a satisfactory patch they saw a glowing red mass of copper sheeting and refrisel cloth. A considerable amount of flame was still leaking from the cracks and edges of the make-shift covering supporting the roof. The roof was flat in the area of the hole and at least one tie-rod appeared red hot, as well as a number of the hanging rods which had been subjected to heat and flame for an extended period of time. In addition, the grievors learned that the tapper on the previous shift had refused to cast out the furnace, that Safety Inspectors had been on the premises and that an order had been issued that due to the state of the roof two men must at all times be stationed at the tap-hole. Faced with all of those circumstances the entire casting crew refused to tap the furnace. Their foreman was Mr. Burt Duckett. When the employees refused to work Mr. Duckett obtained instruction by telephone from Mr. Cooper as to how he should proceed. Cooper instructed him to contact Mr. Andy Artendale, an employee in another department of the refinery who was a member of the Area Safety, Health and Environment Committee, the second tier joint Health and Safety Committee.

32. Mr. Cooper and Mr. Prior then returned to the plant. They met the grievors and Mr. Artendale in the lunchroom. Mr. Prior recounted the events of the preceding shift and advised the employees that by the order of the Ministry inspectors two employees must work at all times at the tap-hole. Mr. Prior then suggested to Artendale that he contact Langlois and Graham, the two employees who had agreed to that arrangement. Mr. Artendale adamantly refused. One of the grievors commented that the two employees who had agreed to that arrangement were a pair of idiots. When Mr. Artendale insisted that he wanted to speak to the Ministry inspectors himself Mr. Prior left to call them back to the plant.

33. While he was gone Mr. Cooper attempted to persuade the employees that the furnace was safe. He told them that with the poling phase complete and the furnace in a calm state it was unlikely that the roof would fall in. The reply from the grievors was "what if it does?" Mr. Cooper reiterated that he did not think that it would. The grievors then expressed their concern over the danger of a surge of molten copper at the tap-hole. They emphasized that they did not think that putting an extra tapper at that location would help at all, and that if anything that arrangement was more dangerous still. The uncontradicted evidence of Mr. Cooper is that the employees were visibly agitated.

34. Mr. Prior returned and indicated to Mr. Artendale that Mr. Tyynela, the Safety Inspector, wanted to speak to him on the telephone. While Artendale left the room to take the call the group quieted down and waited to see what Mr. Artendale could find out. While they waited for his return, some of the grievors expressed complaints about other aspects of safety

in the refinery, including the fact that some safety chains were missing, that some railings on a platform near the tap-hole were not in good repair and that there was an excess of water under the casting wheel.

35. Artendale then returned from the telephone. He addressed the grievors, telling them that he had just learned from Mr. Tyynela that the order of the inspectors was based entirely on the engineers' acceptance of the opinion of the company's representatives. He emphasized that he personally did not buy it. Mr. Artendale then inquired how the furnace could have been charged with the roof in such poor condition and who could have been responsible for the situation that had arisen. Mr. Duckett responded that he had inspected the furnace prior to charging and that there had been no apparent problem with the roof at that time.

36. When Mr. Cooper reiterated that the only solution was to tap the furnace and make the necessary repairs after the cycle was finished, the grievors protested strenuously. Some of them suggested that the furnace should be allowed to cool down and that the bricklayers should be called back in. To this Mr. Cooper and Mr. Prior replied that the company was reluctant to call the bricklayers at this stage. In addition to the extreme heat on the surface roof, the bricklayers would be exposed to the risk of splashes of molten metal as bricks fell into the molten bath while they worked. Both Mr. Cooper and Mr. Prior estimated that the risk to the bricklayers in that situation would be greater than the risk to the tapper and the other members of the casting crew. The grievors disagreed.

37. At the hearing the Board heard evidence from Mr. Prior that it was not practicable for the company to allow the furnace to be shut off entirely and the copper within it to freeze up. According to Mr. Prior it would then have been impossible to generate enough heat in the furnace to return that mass of metal to a molten state. It would, in other words, have seriously damaged, if not destroyed, the furnace.

38. There was nothing, however, to prevent the company from allowing the furnace to be cut back, as had been done after the skimming stage, and to further reduce the temperature at the leak by inserting cold charge into that area of the bath, to allow the bricklayers to effect temporary repairs. That procedure would have cost the company approximately two to four hours of production time. At this point the company had lost an entire shift by arguing with the employees and it would lose yet another eight hours before the matter was resolved.

39. With the impasse continuing, safety inspector Tyynela returned to the plant. This time he came alone. He had a brief meeting with two representatives of the employees, Mr. Artendale and Mr. Pharand, one of the grievors. Then Mr. Tyynela proceeded to examine the furnace once again, this time in the company of the two employee representatives as well as the company officers who had accompanied him to the furnace earlier. There was no appreciable change in the condition of the roof. The make-shift patch was still glowing red and flames were still leaking out all around it.

40. It was after 3:00 a.m. when the joint inspection was done. At that point the safety inspector met with the employees in the lunchroom for approximately one hour. After that meeting he emerged and advised Mr. Cooper and Mr. Prior that he was "unable to make any progress with the employees". Mr. Tyynela then advised the company's officers that he would give them his written order, made under Part IX of *The Mining Act*, R.S.O. 1970, c. 274, to post on the premises. In its final form Mr. Tyynela's order read as follows:

“Pursuant to invoking of Bill 139 at 7:00 p.m. September 2, 1979.

As agreed to by the above personnel, [Messrs. Cooper, Prior, Graham and Langlois] provide a second man to watch tap-hole and flow of molten metal during casting from No. 1 furnace. Notify me when the cast is complete in order to assess extent of damage and to ensure proper repairs.”

The order of the inspector was posted immediately in the lunchroom and was read to the assembled employees by their foreman. The foreman then told the twelve employees that the furnace must be cast. Mr. Duckett advised them that there was no other work available, a fact that is undisputed. He told the grievors that if they refused to perform the work they could be disciplined.

41. Mr. Duckett then began to ask the employees individually if they were willing to work. When the first two had said “no”, another of the group stood and said that they were all sticking together and that they still thought that it was unsafe to tap the furnace in the circumstances. Mr. Duckett then told them that he had no alternative but to send them home. With that, at 4:20 a.m. the grievors left the refinery. They were not paid for the balance of the shift. All of them subsequently received disciplinary notations on their records for their refusal to work.

42. When the day shift arrived at 7:00 a.m. on September 3, 1979, Mr. Cooper and Mr. Wisson, the day foreman, told them what had occurred on the two previous shifts. When the members of the day shift asked Mr. Cooper what he thought, he again stated that he did not feel that there was a substantial risk. Mr. Wisson indicated that he had seen furnace roofs in similar or worse condition when nothing untoward had happened. Mr. Copper also commented that at this point the furnace roof had been sitting without incident for some twelve hours. After considering what Mr. Wisson and Mr. Cooper had to say the employees on the day shift decided to cast out the furnace. This they did, without incident or injury. Casting started at 9:00 a.m. and was completed by 3:00 p.m. Thereafter, with the furnace entirely shut down, a satisfactory permanent patch was put on the furnace roof.

43. The issue raised by the foregoing facts is whether the company breached the provisions of *The Employees' Health and Safety Act*, by imposing discipline upon the grievors. That statute provides, in part, as follows:

“2. Where an employee in a work place has reasonable cause to believe that a machine, device or thing is unsafe to use or operate because its use or operation is likely to endanger himself or another employee or a place in or about a work place is unsafe for him to work in, or the machine, device, thing or place is in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973* or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, the employee may refuse to use or operate the machine, device or thing, or work in the place.

3.-(1) Where an employee in a work place refuses to use or operate a machine, device or thing or refuses to work in a place therein because he has reasonable cause to believe that the machine, device or thing is unsafe

to use or operate because its use or operation is likely to endanger himself or another employee or the place is unsafe for him to work in, or the machine, device, thing or place is in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act* or any regulations thereunder, as the case may be, he shall forthwith report the circumstances of the matter to his employer or the person having control and direction over him who shall forthwith investigate the report in the absence of the employee and, if there is such, in the presence of either a health and safety representative, a committee member who represents employees, or a person authorized by the trade union that represents the employee.

(2) Where the employer or the person having control and direction over the employee disputes the report or takes steps to make the machine, device, thing or place safe or comply with *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, and the employee has reasonable cause to believe that the machine, device or thing is or continues to be unsafe to use or operate because its use or operation is likely to endanger himself or another employee or the place is or continues to be unsafe for him to work in or the machine, device, thing or place is or continues to be in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be, he may continue to refuse to use or operate the machine, device or thing, or work in the place unless a collective agreement binding the employee expressly provides otherwise.

(3) Where the employee continues to refuse to use or operate the machine, device or thing, or work in the place or having returned to work in compliance with the express provisions of a collective agreement binding the employee files a grievance concerning his right to continue to refuse to use or operate the machine, device or thing or work in the place, the employer or person having control and direction over the employee shall notify an appropriate inspector or an engineer, as the case may be, who shall investigate the matter in the presence of the employer or the person having control and direction over the employee, the employee and, if there is such, either a health and safety representative, a committee member who represents employees or a person authorized by the trade union that represents the employee.

(4) The inspector or engineer shall, following his investigation, make a decision whether the machine, device or thing is unsafe for the employee to use or operate or the place is unsafe for the employee to work in or the machine, device, thing or place is in contravention of *The Industrial Safety Act, 1971*, *The Construction Safety Act, 1973*, or Part IX of *The Mining Act*, or any regulations thereunder, as the case may be.

9.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss an employee;
- (b) discipline or suspend or threaten to discipline or suspend an employee;
- (c) impose any penalty upon an employee; or
- (d) intimidate or coerce an employee, because the employee has acted in compliance with this Act.

(2) Where an employee complains that an employer has contravened subsection 1, the employee may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply *mutatis mutandis* to the complaint.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection 2, the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection 1 lies upon the employer or person acting on behalf of the employer.

44. The foregoing provisions give, for the first time, an employee a statutory right to refuse to perform work in unsafe conditions without fear of reprisal from his employer. This Board must interpret and apply the Act bearing in mind the shortcomings of the pre-existing law that it was designed to remedy. Arbitral jurisprudence had previously provided some protection to employees governed by a collective agreement under which they may only be discharged for just cause. Arbitrators have traditionally adjudicated whether the refusal to perform work that is unduly dangerous is just cause for the discipline or discharge of an employee. (*Re Steel Co. of Canada Ltd.*, (1973), 4 L.A.C. (2d) 315 (Johnston); *Re Mueller Ltd.* (1974), 7 L.A.C. (2d) 282 (Hinnegan); *Re International Nickel Company of Canada Ltd.*, (1968), 19 L.A.C. 118 (Weatherill)).

45. It is also arguable that at common law it was the right of an employee to refuse to perform work in conditions that are so dangerous as to be unlawful. In fact that protection has proved illusiary. Firstly, safety laws and regulations might not cover the many kinds of situations that arise in different industrial settings. As a result even though the law of master and servant might prohibit the discharge of an employee for a refusal to perform work that is unlawful, the lines of illegality were often blurred and sometimes non-existent. Secondly, there was no ready, practical procedure by which a rank and file employee could vindicate his common law right not to be discharged for a refusal to perform unlawful work. The time and cost of civil litigation to enforce that right effectively put it out of the reach of the very employees who most needed it.

46. There are several obvious shortcomings to collective agreements as an exclusive means of protecting the safety of workers. Firstly, that protection extends only to those employees who are organized. It is not available to the substantial number of employees who do not have trade union representation or a collective agreement. And even for organized employees that protection can be uncertain or sporadic. A union, with control over the decision

to file a grievance, may not agree with a complainant's view of what is unsafe. And to the extent that a collective agreement may lapse during the "no contract" period, the right to file a safety grievance is suspended. (See, *Re Communications Union Canada and Bell Canada* (1979), 23 O.R. (2d) 701 (Div. Ct.)). The arbitration mode has also been criticized in that the focus of attention is primarily on discipline, and only indirectly on safety. (See, Ison, *Occupational Health and Wildcat Strikes*, (Reprint Series No. 45, Industrial Relations Centre, Queen's University)). Moreover, collective agreements may not provide the kinds of safety policing mechanisms incorporated into *The Employees' Health and Safety Act*. As a result, when a grievance over discipline for the refusal to perform unsafe work reaches an arbitrator the evidence may be less finely tuned because of the absence, during the precipitating incident, of input by health and safety committee members from both management and employee ranks. The evidence, and the practical possibility of resolving the problem, can also suffer without the objective input of qualified government safety engineers and inspectors. The enactment of *The Employees' Health and Safety Act*, can, therefore, be viewed as confirmation that the Legislature recognized that industrial arbitration and the common law did not provide adequate protection to employees confronted with unsafe working conditions.

47. It would appear that previous statutory protection was also found to be inadequate. The main vehicle of worker protection was *The Industrial Safety Act, 1971*, S.O. 1971, c. 83. A wide ranging statute that had grown into a creaky machine, it had its origins in the late nineteenth century response to abuses of the industrial revolution. First enacted as the *Ontario Factories Act, 1884* (47 Vict. c. 39) it became *The Factory Shop and Office Building Act, 1913* (3 & 4) Geo. V. c. 60). Until its repeal by *The Industrial Safety Act, 1964*, S.O. 1964, c. 45 s. 39; *The Factory Shop and Office Building Act* grew, piecemeal, into a catch-all of protections for employees. It forbade the employment of children. It provided a registry to monitor the employment of youths, young girls and women. Among other things it regulated hours of work, required that young girls and women be supplied with chairs and made general provisions for adequate lighting, heating, fire escapes, ventilation and cleanliness in work places. It was not, however, within the power of employees to enforce the legislation. Enforcement required the order of an inspector who could either order corrective measures or close down an operation if necessary. As late as 1964 an employer in breach of a provision of the Act was liable to be fined not more than \$200.00 for an offence.

48. At the same time a panoply of other statutory provisions evolved to govern health and safety in particular areas of industry. Among these are *The Operating Engineers Act*, R.S.O. 1970 c. 333; *The Public Health Act*, R.S.O. 1970 c. 377; *The Elevators and Lifts Act*, R.S.O. 1970 c. 143; *The Boiler and Pressure Vessels Act*, R.S.O. 1970 c. 47; *The Workmen's Compensation Act*, R.S.O. 1970, c. 505; *The Power Commission Act* R.S.O. 1970, c. 354 *The Construction Safety Act*, R.S.O. 1970, c. 81; *The Construction Hoist Act*, R.S.O. 1970, c. 80; *The Mining Act*, R.S.O. 1970 c. 274; *The Silicosis Act*, R.S.O. 1970 c. 438; *The Loggers Safety Act*, S.O. 1962-62 c. 76; *The Energy Act*, S.O. 1971, c. 44; *The Department of Labour Act*, R.S.O. 1970 c. 117; *The Gasoline Handling Act*, S.O. 1966 c. 61. While legislation in particular areas of hazard such as those covered by the foregoing statutes is necessary, the enactment of *The Employees' Health and Safety Act* reflects the Legislature's view that the trade-by-trade method of legislation can never be sufficient. Such particularized legislation tends to be enacted in response to, and not in anticipation of, safety and health problems that arise as new technologies are introduced into the work place. Because of the rate of technological evolution, with new processes, chemicals and machinery being introduced into places of employment on an almost daily basis, the important protection of these specialized safety statutes can never en-

tirely keep up. Moreover, such legislation is often effective only to the extent that it can be enforced by the limited resources of government inspection and monitoring. Perhaps the greatest shortcoming of trade-by-trade legislation is that such laws tend to cover only the most pressing and high profile areas of hazardous work.

49. Before the passage of *The Employees' Health and Safety Act*, there was a growing awareness that the common law protections, traditional collective bargaining mechanisms and safety laws and regulations tied to specific industries simply weren't adequate. In Ontario a Royal Commission found serious shortcomings in safety enforcement mechanisms then in place. (Ont. *Report of the Royal Commission on the Health and Safety of Workers in Mines* (Toronto, Queen's Printer, 1976 – Ham Report)). The report expressed concern that there had been 213 fatalities recorded in the Province's mining industry in the decade 1965-74. The frequency of fatalities per man-hours worked in logging, sawmilling and veneer milling was found to be twice as high. (See *Report of the Royal Commission* p. 131). The Legislature obviously shared the conclusion of the Royal Commission that existing health and safety laws and procedures were inadequate to prevent what had become an unacceptably high toll of industrial fatalities and injuries in the Province. The Report, which became the impetus for reform legislation, is notable for its depth of research and the strength of its conviction that the most important thing to come out of any production facility is the production worker himself.

50. The concerns expressed by the Royal Commission were by no means special to Ontario. In 1970 a United States Government study released some alarming statistics. It disclosed that by 1970, 14,500 persons died annually in industrial accidents. It reported that each year an estimated 2.2 million workers suffered disabling injuries of some degree while at work. Perhaps what is most alarming is that the rate of industrial accidents was found to have increased by 20 per cent between 1958 and 1970. That is apart from the accelerating figures for the detection of occupational disease. (See, U.S. Congress, Senate S. Rept. 1282, 91st Cong., 2d Sess., pp. 2,3,; reprinted in [1970] U.S.C. Cong & AD. News 5177, 5178-79).

51. Apart from taking a social and human toll industrial accidents have a substantial impact on the economy as well. The loss of work caused by industrial accidents has been estimated as 10 times greater than the loss caused by strikes. In 1970 industrial accidents were estimated to be costing the American economy in excess of 8 billion dollars annually, 1.5 billion of which represents lost wages. (116 Cong. Rec. 38613 (1970); U.S. Congress, Senate, S. Rept. 1282, 91st Cong., 2d Sess, pp. 2). A growing awareness of these statistics, increased pressure from organized labour and a coal mining explosion in 1968 that killed 78 miners in West Virginia gave the final impetus for comprehensive reform legislation in the United States. The result was the *Occupational Safety and Health Act of 1970* (21 U.S.C. 651-678 (as amended)). The new legislation (generally referred to as OSHA) gives any employee with grounds to believe his working conditions are unsafe the right to request an inspection of the work place, the right to participate in a "walk around" with an OSHA inspector and the right to invoke the protections of the Act without recrimination by his employer. (See, generally, Feirman, *The Occupational Safety and Health Act, 1970: The Right to Refuse Work Under Hazardous Conditions*, [1979] Wash. U.L.Q. 571).

52. For the first ten years, while the right to call for an inspection under OSHA was clear, the right of employees to refuse to work in unsafe conditions was uncertain. The Act itself does not expressly provide that an employee can refuse to work where there are reasonable grounds to believe it is unsafe to do so. Pursuant to his authority to make regulations under the

Act, the Secretary of Labour published an interpretive regulation stating, in effect, that an employee may refuse to work if he reasonably and in good faith concludes that he is subjected to a real risk of death or injury, that there is not enough time to eliminate the danger through normal enforcement procedures and where the employee cannot obtain a correction of the hazardous condition from his employer. According to the Secretary of Labour, an employee refusing to work in those circumstances would be protected from any reprisal at the hands of his employer. Lower courts, however, differed in their view of the legality of that regulation and the statute became more and more criticized. Without a right to self-help employees could continue to be faced with a choice between working in unsafe conditions and losing their jobs. (See Atleson, *Threats to Health and Safety: Employees Self-Help Under the NLRA* (1975), 59 Minn. L. Rev. 647; Blumrosen, Ackerman Kligerman, VanSchaick and Sheehy, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions* (1976), 64 Calif. L. Rev. 702; Comment – *A Right under OSHA to Refuse Safe Work or a Hobson's Choice of Safety or Job?* (1979), (Baltimore L. Rev. 519). Finally, in a recent landmark decision, the Supreme Court of the United States upheld the validity of the regulation, thus insuring the right of employees under OSHA to refuse to perform unsafe work when there is no alternative available to them, (see *Whirlpool Corp. v. Marshall*, 9 OSHA 39, p. 915)). The legislative and judicial history culminating in the *Whirlpool* decision is a vivid chronicle of the importance of the statutory right of employees to refuse to perform unsafe work without fear of reprisal.

53. In Ontario the right to refuse unsafe work was viewed by the Legislature as sufficiently important to be incorporated as an express provision in *The Employees' Health and Safety Act*. It has been continued in successor legislation, *The Occupational Health and Safety Act*, 1978, S.O. 1978, c. 83, ss. 23, 24. Given the history and purpose of the statutory right of workers to refuse to perform unsafe work, the provisions of section 2 of *The Employees' Health and Safety Act*, must be given a liberal and constructive interpretation that is consistent with the intention of the legislation.

54. In this case the company submits on several grounds that the section does not apply to protect the grievors. First, it argues that the employees did not have reasonable grounds to believe the leak in the roof of the furnace rendered their workplace unsafe. It also argues that the grievors were not acting within the protection of the Act because they reacted as a group and not individually; counsel for the company described their joint action as being tantamount to an unlawful strike. The company further submits that the complaint should be dismissed because the grievors did not testify. Counsel for the company submits that because the grievors did not come forward to give evidence to prove that they had concern for their safety at the time they refused to work this Board should draw an inference adverse to the grievors and conclude that they refused to work for some reason other than reasonable concern for their own safety.

55. It is understandable for a company to be concerned that a group of employees, in the guise of invoking safety legislation, might refuse to work for reasons in fact unrelated to their own safety. In irresponsible hands any right can be abused. Moreover, safety issues, like the one in the instant case, can involve technical factors better understood by management. It is therefore not unnatural for a company to sometimes wonder whether a refusal to work by a group of employees is in fact a gesture of strength that is more impetuous than cautious and to suspect that it is substantially inspired by other concerns.

56. Another natural concern for any company in the face of the right of employees to re-

fuse unsafe work is the element of surprise. One of the things that a company expects in any collective bargaining setting is a freedom from work stoppages during the life of a collective agreement. The cost to the company both in terms of lost production and expenses incurred to remedy an unsafe condition may come without warning and require an unwelcome departure from established financial planning and a company's own schedule for capital and safety improvements. Moreover, any right of groups of employees to refuse to work because of health and safety concerns over such factors as the location or design of a plant, the choice or design of tools and equipment, the kind of materials used and the overall method of production tends to make negotiable matters previously within the exclusive discretion of management. Given all of these factors it is not unnatural for employers generally to have reservations about the motives for any concerted action in the name of safety. (See, generally, Ison, *Occupational Health and Wildcat Strikes*, *supra*).

57. As valid as those general concerns may be, this Board must not construe the statutory right to refuse unsafe work so narrowly as to unduly discourage its legitimate use. In fact valid employee complaints can and do arise in a group setting. When employees do share a concern a group response may be natural. And, as the instant case illustrates, different groups, like different individuals, may react differently to the same circumstances. By the very nature of the employment relationship, it often takes courage to confront an employer. It would, therefore, be unduly restrictive and unrealistic to construe the statutory right to refuse unsafe work as being unavailable to employees who share a concern and act with a common purpose.

58. The rights conferred by the Act are not unlimited. Nothing, for example, permits employees who are not themselves involved in a perceived safety hazard the right to down their tools out of sympathy for another employee whom they think is confronted with unsafe work. Before any employee can invoke the right to refuse work he must have reasonable grounds to believe that he himself is in jeopardy or that he will place another employee in jeopardy if he proceeds to work. The question must always be whether the employees refusing to work, whether individually or as a group, each have sufficiently close relationship to a perceived hazard that they are themselves in peril or that they will put another employee in peril by performing their work. Moreover, the refusal to work protected by the statute is not a general withholding of services. An employee who protests that working conditions on a particular job are unsafe can't refuse to perform alternative work that isn't unsafe.

59. The requirement that an employee have "reasonable cause to believe" that there is danger imposes an objective standard by which to test the employee's action. The Act does not, by the use of the words "reasonable cause", legislate different standards of protection for the squeamish and the intrepid. Different employees within the same work place may have different views of what constitutes an acceptable risk. Likewise, strangers to a particular trade or industry might view with alarm situations that are not seen as hazardous by the people who work in that field on an every day basis. On a complaint such as this, therefore, in considering whether an employee had reasonable cause to refuse to work in a given situation, this Board must ask itself whether the average employee at the work place, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard to himself or to another employee.

60. The ability of an employee to invoke the right to refuse work does not depend on whether there is in fact any danger. The question is whether at the time an employee refuses to

perform his work he has reasonable cause to believe that it is unsafe to do so. The fact that it may later be shown that there was no real danger at the time an employee refused to work doesn't mean that the employee was wrong in exercising his right under the Act. The events must be assessed in the light of knowledge available at the time that the employee refused to work.

61. We turn to apply the foregoing principles to the evidence before the Board. We look first to the merits of the employees' refusal when they arrived at work. We then look to whether they could act as a group. We next examine whether they could justify their refusal after the explanations of management, and lastly whether they could continue to do so following the Inspector's visit. Finally, we will examine the company's allegation that by not testifying the grievors failed to rebut an inference that they were acting out of an ulterior motive.

62. When the grievors left the refinery at the end of their shift on the morning of Sunday, September 2, 1979, there was a visible leak of flame in the roof of anode furnace No. 1. The masons had been called and repairs were scheduled for that morning. When they returned to work at midnight the problem was not solved. The temporary patch put in by the masons did not work. A three foot square area of the furnace was a red glowing mass, covered with copper sheets and refrisel cloth that prevented any clear view of the extent of the damage. Flames between six and eight inches in height were escaping from the crevices in the debris. The hanging rods above the furnace were red hot and one of the vital tie-rods supporting the furnace roof had a red glow. While Mr. Prior believed that the glow was a reflection of light from the patch beneath, he acknowledged that it appeared as though it might be red hot. By Mr. Prior's own evidence, the roof had flatened in the area of the hole and was, overall, "not a good looking roof." Faced with those facts alone the Board is of the opinion that the employees had cause to wonder about the safety of the furnace.

63. In addition to what they saw, however, the employees were told that the tapper on the previous shift had refused to work out of fear that the roof could cave in and cause a surge of molten metal at the tap-hole. The employees were also informed that two engineers from the Ministry of Labour had come to the plant on the previous shift and had issued an order that there must be two tappers on duty until the casting cycle was complete. It was reasonable for the employees to assume that government engineers would not have made the order unless they considered the condition of the roof to be precarious.

64. The order itself was puzzling and would cause any reasonable employee further concern. If there was a genuine risk of a cave in, or if enough brick could fall from the roof into the bath to cause a sudden surge of molten metal at the tap-hole, there was little justification for putting two men instead of one at the area of highest risk.

65. On the basis of these facts the Board is satisfied that at the beginning of their shift the grievors had reasonable cause to believe that it would be unsafe for them to work.

66. Were they entitled to act as a group in exercising their refusal to work? Each and every one of them, on the evidence before the Board, had reasonable grounds to be concerned for his own safety. If any substantial surge should occur at the tap-hole, so that the tapper was injured and unable to control the flow of the molten copper, the risk of an overflow of the metal onto the refinery floor where it might come into contact with water posed a genuine risk to the safety to all members of the crew. There were, in all of the circumstances, reasonable

grounds to believe that there was a substantial risk to every one of the grievors. On that basis, out of concern of their own safety, they were therefore entitled to invoke the protection of the Act either collectively or individually.

67. Each of them was also entitled to do so out of fear of jeopardizing the safety of others if he proceeded with his own work. If, for example, the ladle tender or wheelman proceeded with their work they would put the tapper in jeopardy because they could only work if he was stationed at the tap hole, an area they all had reasonable grounds to believe was especially perilous. Likewise, if the tapper worked and should be unable to control the flow of the molten copper he would jeopardize the safety of all the other employees on the crew as they were downstream from him. Therefore each employee was further entitled to refuse to work out of a reasonable fear that to engage in the casting operation would be likely to endanger other employees.

68. We consider next whether the employees could continue to refuse to work after they received the explanation and advice of management. The employees did not have the experience of Mr. Cooper and Mr. Prior. They could not be expected to have the same faith in the solidity of the sprung-arch roof that their more knowledgeable supervisors did. Nor could they be expected to know, as Mr. Prior apparently knew, that the specific gravity of copper was such that bricks falling into the molten bath should not cause any serious wave action.

69. The fact that Cooper and Prior were finally proven right doesn't diminish the merits of the grievors' complaint. That the furnace roof ultimately proved to be solid in the area of the leaky patch only shows the company turned out to be right after all. It cannot be the basis for an inference that the employees could not have reasonably believed that the company was wrong. At the time the employees refused to work no one knew what was under the red-hot metallic sheets and cloth. In the circumstances the Board concludes that their fear that it was a precarious expanse of roof was reasonable. The Board is satisfied, therefore, that the employees had reasonable grounds to fear for their safety after the inspection and explanation of their supervisors.

70. Were the grievors still justified in their refusal to work after their encounter with Mr. Tyynela, the safety inspector, and the confirmation of his order? The evidence establishes that Mr. Tyynela met at length with the employees on the midnight shift. This he did after he inspected the roof of the furnace in the presence of their two representatives and the company's supervisors. Mr. Tyynela honestly explained to the employees that he had no personal experience in anode furnaces. He made it clear that he was relying on the expertise of the company representatives with whom he had spoken. In other words, the inspector's opinion, albeit the opinion of a neutral party, was not the opinion of a neutral expert.

71. It also appears that while he carefully inquired of the company supervisors what their experience was, he did not ascertain from the company the fact, confirmed in evidence, that it was possible to cool down the furnace, temporarily repair the roof and resume casting within four hours. An inspector with the authority to make a remedial order must, in determining the level of acceptable risk, explore the obvious question, "Acceptable in the face of what alternative, and at what cost?". This, according to Inco's evidence, he did not do. The employees cannot, in all the circumstances, be faulted for being skeptical of an official opinion that appeared to be an adoption of the company's view.

72. Their skepticism could only be heightened by their preception of the Inspector's order. While it might have been made with the good intention of comforting Mr. Langlois, in fact it was likely to give other employees the impression that the government engineers felt there was a danger. Viewed in that way, it became more alarming because it appeared to place two employees rather than one in the area of greatest jeopardy, next to the tap-hole. Subject, therefore, to the argument of the company respecting the good faith of the employees' action, the issue next to be addressed, the Board must find that after the Inspector's visit the grievors continued to have reasonable cause to believe that anode furnace No. 1 was unsafe.

73. The employees did not testify as to their own thoughts and feelings at the time they dealt with either their supervisors or the safety inspector. In his argument, counsel for the company suggested that there might have been ulterior motives for the refusal of the employees, as a group, to cast out the furnace. As the Board has noted, group action is not in itself unlawful under the Act. But that does not mean that a group refusal, any less than an individual's refusal to work, should not be scrutinized for its *bonafides*. As the procedures under *The Employees' Health and Safety Act* unfold in a given incident, there may be a growing onus on employees to establish that they had reasonable cause to fear for their safety. Where at the time of the incident the evidence establishes that the employer has given a credible explanation to show that the work place is safe, the employees may be required at the hearing to show that they still had cause to fear for their safety. That onus may increase after the employees have viewed the hazard with a safety inspector and the engineer has expressed his objective opinion that there is no immediate danger. This was expressed by the Board in *Canadian Gypsum*, [1978] OLRB Rep. Oct. 897 at p. 902, as follows:

"The right of an employee to refuse work under Bill 139 is not an absolute right. It is predicated upon "reasonable cause to believe" that the conditions specified in Section 2 of the Act prevail. If an employee cannot establish that he has "reasonable cause to believe" that the conditions specified in Section 2 prevail, or if he does have "reasonable cause to believe" but refuses to work for some other reason he is not acting in compliance with the Act and is not protected by the Act. The procedure set out in Section 3 is one which is purposely designed to focus the attention of the parties on the immediate problem, to facilitate a resolution of the problem, and, in the event the employee continues his refusal to work, to test the reasonableness of his belief that the conditions specified in Section 2 exists. If the employer, after investigating, denies that there is any validity to the employee's belief or takes corrective action, it will be more difficult for the employee to establish that he has "reasonable cause to believe" that conditions exists which permit him to refuse to work. If an employee establishes his right to refuse to work following the employer's investigation, the matter must be investigated by an inspector who must make a decision as to whether the conditions set-out in Section 2 of the Act are present. An employee who continues to refuse to work in the face of an investigation and the decision by a neutral expert that these conditions do not exist, must meet the substantial onus of establishing that he has reasonable cause to believe otherwise and is entitled to the protection of the Act."

74. When in a hearing before the Board it appears on the strength of the company's

evidence that an employee did not have reasonable grounds to believe conditions were unsafe, or that he refused to work for other reasons, the employee may be required to come forward and show that he had reasonable grounds and did not act out of some other motive. There is no doubt that where there is, at the conclusion of the company's case, substantial evidence from which it can be inferred that employees in fact refused to work for reasons unrelated to safety, the Board may, absent testimony from the grievors, conclude that they did not believe themselves to be in peril. The employees' belief can, in those circumstances, be a relevant and telling factor.

75. Under the Act, however, an employee's belief is not the ultimate issue. It is not a precondition to the protection of the Act that an employee first be convinced that he is himself in a situation of peril. The statute doesn't require that an employee believe he is in danger, but only that he have reasonable cause to think so. In some cases that distinction will be important. Take, for example, a group of employees faced with a potential danger. Several of them are convinced that the risk is too great. One of them, however, doesn't agree. Having cause to think it unsafe, in fact he doesn't believe it is. As the Act is framed that employee may nevertheless refuse to work. He may refer to the judgement of his fellows out of an abundance of caution, knowing that there are reasonable grounds to disagree with his own opinion. To be protected by the statute, therefore, an employee need not necessarily come forward and prove his personal belief.

76. In this case the evidence produced by the company gives an ample picture of the circumstances that confronted the employees. There is, moreover, nothing in that evidence to suggest that the employees were acting out of some ulterior motive or to further any purpose other than their own safety. Mr. Cooper described how agitated the employees were. Mr. Prior's testimony was that he was himself convinced, and had no reason to doubt, that fear for their safety was the only thing that motivated the grievors in their refusal to work. In light of the company's own evidence, the Board can give little weight to the speculative argument of its counsel that there might have been some other reasons behind the employees' action. Nor can we accept that on the strength of the evidence there was some affirmative obligation on the employees to testify in that regard.

77. In light of the evidence, the Board is satisfied that at approximately 4:00 a.m. on September 3, 1979, after the Inspector's visit, when the grievors continued to refuse to perform the casting operation, they had reasonable cause to believe that their work place was unsafe. Their refusal to work therefore was in compliance with *The Employees Health and Safety Act*. There is nothing in the evidence to suggest that the company sends its employees home when casting is delayed for a few hours while a temporary patch is made in the furnace roof. There is therefore no reason to conclude that the employees would have lost any wages if Inco had responded to their concerns and had patched the roof during the midnight shift. Inco was, therefore, not entitled either to suspend them for the balance of the shift or to register any disciplinary notation against their record.

78. For all the foregoing reasons the Board orders that Inco compensate the grievors, without loss of benefits, for the hours of work of which they were deprived and that it remove from their records any disciplinary notations resulting from their refusal to perform work on the midnight shift of September 3, 1979.

79. The Board shall remain seized of this complaint in the event that the parties are unable to agree as to the interpretation or implementation of this decision.

DECISION OF BOARD MEMBER J. A. RONSON:

The decision of Mr. Ronson will follow.

0743-80-R Clarence Hynes, Applicant, v. International Association of Machinists and Aerospace Workers, Local 788, Respondent.

Practice and Procedure – Termination application prima facie untimely – Board dismissing under Rule 46

BEFORE: George W. Adams, Chairman, and Board Members J. D. Bell and C. Ballentine.

DECISION OF THE BOARD; July 22, 1980

1. This is an application for a declaration terminating the bargaining rights of the respondent trade union brought under section 49 of *The Labour Relations Act*.
2. This application was filed with the Board on July 8th, 1980. Paragraph 5 of the application states in part:

“Our union contract expires September 30th, 1980.”
3. The collective agreement in effect between the employer of the applicant and the respondent trade union has a term of operation which commenced September 30th, 1978, and which expires on September 30th, 1980. Thus the collective agreement has a term of two years.
4. Section 49 of the Act, the section under which the application was made provides:

“(2) Any of the employees in the bargaining unit defined in a collective agreement may... apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for *a term of not more than three years, only after the commencement of the last two months of its operation;*”
5. In this case the applicant applied to the Board for a declaration under Section 49 on July 8th, 1980, which is prior to “the commencement of the last two months” of the operation of the collective agreement in effect between the applicant’s employer and the respondent. Thus, the application is clearly untimely.

6. Section 46 of the Board's Rules of Procedure, Regulations 551, R.R.O. 1970 provides:

"Where an application or complaint does not, in the opinion of the Board, make out a prima facie case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall, in its decision, state the reason for the dismissal".

Rule 46 permits the Board to dismiss a complaint or application without a hearing where the complaint or application does not, on its face, make out a case for the remedy requested. (See *Ford Motor Company*, [1972] OLRB Rep. Sept. 828; *Concrete Construction Supplies*, [1979] OLRB Rep. Dec. 1152).

7. In this case the application for a declaration terminating the bargaining rights of the respondent is untimely. The Board cannot grant the applicant the remedy he seeks at this time by virtue of Section 49(2)(a) of the Act. Thus the application must be dismissed. However, this dismissal does not preclude the applicant from applying to the Board under Section 49 in a timely manner.

0335-80-U Kesar Singh Riyait, Complainant, v. Local 1590, International Brotherhood of Electrical Workers, Respondent, v. I.T.E. Industries Limited, Intervener.

Duty of Fair Representation – Grievor discharged for overstaying leave of absence – Union not referring grievance to arbitration – Refusal considered by different levels of union – No violation of section 60

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *Michael F. Smith for the complainant; Morley E. Fisher, Randall S. Browne and Wm. J. Moore for the respondent; Charles Campbell for the intervener.*

DECISION OF THE BOARD; July 25, 1980

1. This is an application under section 79 of *The Labour Relations Act* alleging a breach of section 60 of the Act. The complainant, Kesar Singh Riyait, was employed by I.T.E. Industries Limited from June of 1973 until January 1980 when he was discharged for failing to report for work when scheduled to do so. Mr. Riyait filed a grievance alleging that his discharge was "without just cause". The alleged breach of section 60 arises from the respondent union's failure to take this grievance to arbitration.

2. Charles F. Campbell, appeared on behalf of I.T.E. Industries Limited, and indicated that he would take an active (if somewhat limited) role in the proceeding. Having regard to Rule 54 of the Rules of Practice, the Board hereby directs that I.T.E. Industries Limited should be added as a party in this matter.

3. In or about November 1979, Mr. Riyait approached his employer and requested a six week leave of absence so that he could visit his aged and ailing mother in India. The company was not prepared to grant a leave of absence, but it was prepared to allow him to combine his annual holidays with certain statutory holidays and planned plant shutdown days, which would permit an absence from work for four consecutive weeks. Riyait made several requests to extend this period by one or two weeks, but all of these requests were refused. The company made it clear that it expected Riyait to return and commence work on January 21st; nevertheless, Riyait made reservations with a nominal return date of *January 26th*, and as it turned out, he did not actually return to Canada until February 2nd – a period of absence coinciding precisely with that which he had previously requested and been refused.

4. In November, at about the same time as he was seeking an extended leave of absence, Riyait began to complain of low back pain; however, this did not interfere with the performance of his job (which involves some heavy lifting), nor did it interfere with his vacation plans. He visited his doctor before leaving the country and received medication. On December 21, 1979 he left work on vacation. On December 24, 1979 he flew to England to pick up his mother, who has resided there since 1976, and on December 30th flew to India.

5. Riyait had not visited his house in India for eight years, and when he returned there was considerable work to do. Riyait maintains that on January 13th he injured his back while moving furniture. On January 14th he sent a telex to the company which reads as follows: "I am sick. Certificate follows." At this point Riyait had not yet seen a doctor and had no medical certificate. He did not see a doctor until four days later. When asked in cross-examination to account for the telegram and subsequent delay in consulting a physician, Riyait explained that his back pain wasn't serious on January 14th, but he decided to inform his employer because he thought his back might get worse, and he might have to stay in India for an extra few weeks. Riyait testified that on January 18, he visited a physician who prescribed two weeks bed rest. Apart from the telegram sent on January 14th, there was no further communication with the company concerning his illness or his expected date of return.

6. On January 22, 1980, the day after he was expected to return to work Riyait travelled thirty miles by bus to change the return date on his airline ticket from January 26th to February 2nd. By January 29th, he testified, he was feeling better; and on January 30, 1980 again visited his Indian physician who declared him "completely recovered". He had not, of course, reported for work on January 21st, as he was scheduled to do, nor had he advised the company that he would not be able to return on time. Accordingly, on January 29, 1980 the company sent a registered letter to his Toronto address, advising him that he had been discharged.

7. Riyait learned of his discharge when he reported for work on Monday, February 4th. He told the company that he was sick, could not work, and planned to visit his doctor. Subsequently, Riyait tendered a number of short doctor's notes to support his explanation of his illnesses. None of the notes were very detailed or spoke specifically to Riyait's inability to travel or inability to work. There were also certain apparent inconsistencies. On January 30, 1980, Doctor H.C. Loomba, a senior medical officer at a hospital in India, pronounced that "today on re-examination (Mr. Riyait) is *completely recovered* and is *declared fit*". Four days later his physician in Toronto issued a note advising that Mr. Riyait was still complaining of back pains (but not mentioning his fitness to work). It was this complaint which Riyait claimed prevented him from working. On February 8th the same physician issued a note reading

“Mr. K.S. Riyait will be *fit* to resume his duties from 11-2-80”. The company was suspicious, and was not prepared to give much credence to these doctor’s notes. This was not the first time that Riyait had failed to report for work as scheduled. In 1975 he was discharged for overstaying his vacation in almost identical circumstances. On that occasion, too, he returned two weeks late because of an alleged illness, sustained while on vacation, which prevented him from travelling. Apart from these two instances which coincide with his foreign travel, he has no record of health problems or illness. In 1975 the trade union obtained Riyait’s reinstatement through the grievance procedure, but the company did not regard the latest incident as a mere coincidence, and was not willing to compromise.

8. Mr. Riyait’s evidence concerning the grievance procedure and the way in which his case was handled was sketchy and incomplete; and while one cannot expect an untrained witness to recall with precision events which occurred some time ago, it became evident to the Board that Mr. Riyait simply did not understand the grievance process and had some difficulty comprehending questions put to him in English. Mr. Riyait did not contact the union until several days after he was fired; and testified that he did not file a grievance until *after* a meeting between company and union officials. The Board is satisfied that the meeting which he described took place *in response* to his filing of a formal grievance on February 12, 1980. This grievance was prepared by M.S. Plaha, his shop steward, and signed by both Plaha and the complainant.

9. In accordance with the provisions of the collective agreement, the complainant’s grievance was filed at step 4 and discussed by company officials and the union’s grievance committee. Immediately after this meeting, the grievance committee met with Riyait to go over the facts again and consider the merits of his grievance, and the likelihood of success if the matter were taken to arbitration. The company would not reinstate him as it had on the earlier occasion, because it simply did not believe his explanation; and after an assessment of the facts, the union concluded that an arbitrator was unlikely to believe him either. The Board had the opportunity to hear the same explanation as the complainant gave to the company and the union. In the circumstances, and having regard both to the manner in which the complainant gave his evidence and the credibility, clarity and consistency of his answers, the Board is satisfied that the union’s conclusion was not an unreasonable one. The union was also aware of those sections in the collective agreement which appear to speak specifically to the complainant’s situation, and which, consequently, narrow the remedial authority of an arbitrator. These provide:

“15.03 An Employee loses all seniority and his employment with the Company shall terminate under the following conditions:

- (c) Is absent from work for more than three (3) consecutive working days without notifying the company within this period and without a satisfactory explanation upon a return to work after an absence of more than three (3) consecutive working days.
- (d) Is absent from work for periods beyond those outlined in Article 15.02 (b), (c) and (f). [layoff or illness of more than 2 years or beyond his annual vacation period]

- (e) is absent from work without satisfactory explanation beyond the period of any leave of absence granted by the Company.”

In view of the language of the collective agreement and the anticipated problems respecting the grievor's credibility, the grievance committee decided that his case could not be won, and should not be taken to arbitration.

10. Although the constitution does not specifically provide for an appeal the practice of the union permits individuals to appeal the decision of the grievance committee to the union's executive board. Mr. Riyait was unclear about the mechanics of this process or how the appeal was launched in his case. He did not recall being advised by the grievance committee about the possibility of appeal. The Board is satisfied however, that he was so advised, immediately after the committee told him that they had decided not to proceed with his grievance. Indeed, the grievance committee considered the matter sufficiently significant to initiate an appeal itself.

11. A special meeting of the local executive board was held on the evening of Thursday, February 28th to deal with two cases in which the grievance committee had recommended that a discharge grievance not proceed to arbitration. (A “special” meeting was necessary because of the time limit for proceeding to arbitration prescribed by the collective agreement). Mr. Riyait was notified of, and present for, the meeting. The facts of his case were fully canvassed *de novo*, and he took an active part in the process. The executive board eventually decided that his grievance was without substantial merit and should not be taken to arbitration. Mr. Riyait was advised in writing of this decision by letter, dated March 3, 1980. After reviewing the circumstances of his case, the letter concludes: “In view of the above incidents, the Board is in doubt about the legitimacy of your illness, and it feels that there is little likelihood of being able to win an arbitration case in your favour.”

12. Following receipt of this letter, Mr. Riyait sought the advice of a solicitor who wrote to the union advising that Riyait planned to challenge the executive board decision at the next local union meeting, scheduled for March 27, 1980. Again, the constitution does not specify a formal right of appeal, however the decision of the executive not to proceed to arbitration is recorded in the executive board's minutes which can be approved or disapproved by the local union membership. Betty Aldred, the local union president testified that the local union membership almost never overrode an executive board decision respecting a grievance, but it has happened on very rare occasions. The union fully expected Riyait and his solicitor to attend, and sent the solicitor a change of address notice to ensure that they would be aware of the new location where the meeting would be held. Mr. Riyait testified that he did not attend the meeting because of a message which he received from Muktiar Singh Plaha, – a friend of Indian descent who was also Riyait's area shop steward and a supporter in his efforts to have his case taken to arbitration.

13. The precise content of the message from Plaha is important to the present case, but unfortunately, Mr. Riyait's recollection of this, as of the other events, was far from clear. He testified that Plaha told him that he (Plaha) had received a message from the chief steward, who, in turn, had been told by Morley Fisher, the business representative of the local, that he (Fisher) planned to take the case to arbitration. This is the version which is most favourable to the complainant's case but he was closely cross-examined on the point and (perhaps because of an imperfect recollection or his evident difficulties with the English language) it is not the only

version which he gave. At one point, for example, he said that Plaha told him that the case *might* be taken to arbitration because of the business agent's second thoughts.

14. As a result of this message from his friend Plaha, the complainant testified that he decided not to attend the meeting. The local union officials expected him to attend, and when he did not do so, the executive board's decision was affirmed by the local union membership. At no time did the complainant communicate with the local union officials to verify Plaha's message (assuming that it was accurate and does not reflect the complainant's own misunderstanding) nor did he subsequently advise the union that Plaha's message had misled him to his detriment or deprived him of an opportunity to make his case before the local union membership. The first time that matter was raised, was on the section 60 complaint. Had the matter been brought to the local union's attention, the Board accepts Betty Aldred's testimony that he would have been given an opportunity to speak at the next local meeting. Even the particulars of alleged misconduct filed on this complaint would not alert the union to the fact that a shop steward might have misled Riyait – albeit innocently. Those particulars read as follows:

“On or about 28th of February, 1980 the grievor was dealt with by the executive board of the Respondent contrary to the provisions of section 60 of *The Labour Relations Act* in that it did on its own behalf or on behalf of the respondent: make a decision refusing to carry the complainant grievance against his discharge by the employer to arbitration and further failed to submit a report of its action to the meeting of the local union for approval as required by Article IV, Section 1 of the local union By-laws and Article XIX Section 13 of the B.E.W. constitution and further did not allow the complainant opportunity to comment upon the decision of the Executive Board at the meeting of the local union. Subsequently the complainant was given no notice of the local union meeting at which the decision of the Executive Board would be submitted for approval and was given no opportunity to put his position to the members of the local union for their consideration.”

There is no allegation against Plaha as shop steward or referring to any misrepresentation. Moreover the evidence is clear that, although the local union decided not to take Riyait's case to arbitration, the local union executive *did* submit a report of its decision to the local membership for approval, the executive *did* send a change of address notice to Riyait's solicitor so that he could attend the meeting; and Riyait *was* given the opportunity to put his position to the membership of the local. The executive board expected him to attend. There is no evidence that prior to the filing of the present complaint the union was even aware of Riyait's explanation for his nonattendance.

15. The Board is also satisfied, that the “messages” to which Plaha allegedly referred were never given, and there would have been no basis for Plaha's concluding that the executive board had reversed its decision and decided to take the complainant's case to arbitration. Both Fisher and the Chief Steward testified that they never suggested to anyone that the executive board had changed its mind. Plaha himself did not testify. Either the complainant, or Plaha was mistaken, and if Plaha was mistaken, and relayed his misunderstanding to the complainant, the Board is satisfied this misrepresentation was an entirely innocent one. Plaha is the complainant's friend, and a supporter of his position. There is simply no reason why Plaha would have intentionally misled Riyait, and Riyait does not claim that this is the case. Having

regard to the complainant's imperfect recollection of events, and his unfamiliarity with the union's procedures, it is equally probable that it was the complainant who misunderstood what he was being told. Riyait's confusion is reflected in his evidence. In cross-examination, the respondent was anxious to ascertain why he had not brought the reason for his failure to attend the meeting to the attention of the local union officials. He was asked repeatedly to specify when he had learned that there had been a misunderstanding and that the executive board did *not* plan to take his case to arbitration. He gave several slightly different answers to this question. At one point he testified that he learned of this on the day of the meeting (*i.e.* prior to the meeting). Subsequently he testified that as of April 13th, 1980 – he still didn't know if his case was proceeding to arbitration or not. Finally, he testified that he attended the April 13th, meeting *because* he knew his case was not going to arbitration, and Plaha had agreed to raise the matter on his behalf.

16. The complainant did attend the "unit meeting" on April 13th. (It should be noted that the local union is a composite local comprised of a number of units). The complainant did not speak himself, but Plaha raised a question on his behalf and suggested that further consideration should be given to his case. There is no evidence before me to suggest that Plaha, or the complainant raised his failure to attend the previous local meeting, or commented upon the misleading message he had allegedly received from Plaha. There was a brief discussion of the grievance and while no formal vote was taken, the members in attendance were almost unanimously of the view that the matter was closed, and that the meeting should move on to other business. On May 14, 1980, Mr. Riyait filed the present complaint.

17. Section 60 of *The Labour Relations Act* provides as follows:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

The Labour Relations Act constitutes the trade union as the employees' exclusive bargaining agent. Within the framework of collective bargaining an employee must depend upon the union to represent him, and cannot bargain individually to establish his terms and conditions of employment. However, the trade union's right to represent employees is not unfettered, and its exclusive bargaining agency carries with it a commensurate responsibility: the union must represent each employee in the bargaining unit, in a manner that is neither "arbitrary, discriminatory, or in bad faith." By enacting section 60 the Legislature has sought to temper the union's authority and prevent abuses which might arise if that authority was entirely unreviewable.

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union's conduct may be properly regarded as "arbitrary" – bearing in mind that the union's affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature undoubtedly sought to protect the employee from an abuse of the union's authority, I do not think it was intended that every miscalculation, honest mistake, or error in

judgement would constitute a breach of a public statute. The standard to which a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

“40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546.”

Similar views were expressed in *Re: Ontario Hydro Employees' Union – CUPE Local 1000 and Walter Prinesdomu*, [1975] OLRB Rep. May 444, at p. 462 ff. in a long passage which canvassed the intended meaning of the word “arbitrary”:

“In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent's particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word “perfunctory” and observed that a trade union, “in a non arbitrary manner [must] make decisions as to the merits of particular grievances”. It could be said that this description of the duty requires the exclusive bargaining agent to put “its mind” to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness....

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the

scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances-errors consistent with a "not caring" attitude must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct."

19. It is clear that in order to establish a breach of section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

20. In the present case, the evidence discloses that the grievance committee carefully considered the complainant's case and concluded, not unreasonably, that his position would be difficult to sustain at arbitration. It was the grievance committee (including Plaha) and not the complainant, which set in motion an appeal of its own decision to the executive board. At the executive board, the senior officials of the local canvassed the matter *de novo* with the grievor in order to ascertain all of the facts and any mitigating circumstances which Mr. Riyait could adduce. Mr. Riyait actively participated in this process. There is no dispute that the grievor had ample opportunity to put his case, nor is there any evidence that the executive board failed to give that case its careful consideration. On the basis of the information before it, the executive board unanimously concluded that the case should not proceed to arbitration. When Mr. Riyait, through his solicitor, subsequently advised that he intended to challenge the executive board decision at the next local union meeting, the executive board made sure that he received a change of address so that he could attend. There is no evidence of any attempt to mislead him or dissuade him from presenting his motion. The complainant's various allegations that the executive board failed to notify him of the meeting, failed to give him an opportunity to attend, are all without foundation. There is no evidence of any impropriety whatsoever on the part of Morley Fisher or the local union executive board—and as has already been noted, it was the executive board's alleged misconduct which was the basis of this complaint.

21. Plaha's innocent misrepresentation (assuming, without finding, that it occurred in the way the complainant contends) is the only feature of the evidence which could be considered "arbitrary" or which suggests any error on the part of the union. As a result of re-

ceiving this message, the complainant decided not to attend the local union meeting and lost his opportunity to persuade the membership that the decision of the grievance committee and the executive board should be reversed. It may be that his chances of doing so were remote (having regard, for example, to the way in which his fellow employees of I.T.E. regarded his case), but Betty Aldred, the local union president, testified that on rare occasions the membership did reverse an executive board decision, so the opportunity was not entirely valueless. On the other hand, the complainant now relies upon an alleged conversation with Plaha which contradicted the letter from senior union officials (but which the grievor did not check); which allegedly contained a misrepresentation which was not brought to the union's attention; and which was not even raised as a basis for the present complaint. The Board accepts the evidence of Mrs. Aldred, the local union president, that had Mr. Riyait brought this misunderstanding to the attention of the local union officials, the matter could have been rectified by permitting him to address the next local meeting. (Indeed, now that the union is actually aware of his concern, he may still be entitled to do so). When one also finds, as the Board does, that neither of the "messages" allegedly referred to by Plaha were in fact transmitted; and when one considers the complainant's general credibility and language problems, it is difficult to accept that any misrepresentation actually occurred. However, even if the complainant's evidence is accepted in its totality, it reveals only that there may have been an honest mistake on the part of Mr. Plaha – the grievor's friend, supporter, and area shop steward – who may have been under the mistaken impression (without any apparent foundation) that the executive board had had a change of heart. I do not think that an entirely innocent misrepresentation will support a finding that the union's conduct is "reckless", "capricious", "arbitrary" or a breach of *The Labour Relations Act* – especially where, as here – the union has in fact carefully considered and rejected the complainant's position. Accordingly, the complaint is dismissed.

1923-79-M Mechanical Contractors Association Ottawa and Mechanical Contractors Association Ontario, Applicants, v. J.G. Rivard Limited and Michel Rivard Plumbing Limited, Respondents.

Arbitration – Construction Industry – Parties – Employer bargaining agency seeking employer contribution to industry fund – Whether relief by arbitration available – Union not party to proceeding – Whether violation of agreement founding action under Section 79

BEFORE: R.A. Furness, Vice-Chairman, and Board Members C.A. Ballentine and F.W. Murray.

DECISION OF THE BOARD; July 31, 1980

1. The applicants have referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration under section 112a of *The Labour Relations Act*.

2. In the referral the applicants have stated that the applicants and the respondents are bound by the terms and conditions of the Ontario Provincial Collective Agreement between

the Mechanical Contractors Association Ontario and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada which became effective in 1978 and which expired April 30, 1980.

3. The text of the grievance is set forth in a letter which was filed with the referral. The relevant part of the letter states:

"J.G. RIVARD LIMITED
1735 Courtwood Crescent
Ottawa, Ontario
K2C 2B4

and

MICHEL RIVARD PLUMBING LIMITED
1735 Courtwood Crescent
Ottawa, Ontario
K2C 2B4

Dear Sirs:

Re: J.G. Rivard Limited and Michel Rivard Plumbing Limited,
grievance of Mechanical Contractors Association of Ottawa and
Mechanical Contractors of Ontario

We are the solicitors for the Mechanical Contractors Association of Ottawa and Mechanical Contractors of Ontario and hereby on behalf of those Associations grieve that J.G. Rivard Limited and Michel Rivard Plumbing Limited have failed to remit and continue to fail to remit Industry Fund Contributions in accordance with Schedule G of Appendix 13 of the Collective Agreement between Mechanical Contractors Association Ontario and Ontario Pipe Trades Council. Both Companies are bound by the said Collective Agreement.

The violations commenced on or about June 15, 1978 and continue to date. The Grievors Claim is for:-

- (a) All damages occurring as a result of the failure to remit including all past contributions owing and all costs incurred in the collection thereof; and
- (b) A direction that J.G. Rivard Limited and Michel Rivard Plumbing Limited henceforth remit Industry Fund Contributions in accordance with Schedule G of Appendix 13 of the Collective Agreement."

4. In their replies the respondents did not confirm the text of the grievance and denied any collective agreement between them and the applicants or in which the applicant had any interest and that the applicants as employer organizations or on any other basis did not re-

present them. In the alternative the respondents adopted the position that the claim of the applicants should be dismissed for the reasons set out in their replies. In their replies the respondents stated:

- “1 This is a claim by an employer organization to collect if it can from the Respondent amounts classed as payments for “industry fund” which the Applicant or its successors have been attempting to do since 1973 without success. It will be the position of this Respondent that all or any claims with respect to the industry fund by the Applicants are “res judicata”. The Respondent is not and has never been at all material times a member of the Applicant organization.
2. By letter dated June 22nd, 1973, attached hereto as Exhibit “A” the Mechanical Contractors demanded payment for industry fund dues.
3. A joint conference board ruled against them by a decision dated December 11th, 1973, attached hereto as Exhibit “B”.
4. The Mechanical Contractors Association then brought an application before this Board under Section 112(a) of the Act and the reasons of the said Board are hereto attached as Exhibit “C” and the rejection of the Mechanical Contractors Association appeal on November 23rd, 1976 is hereto attached as Exhibit “D”.
5. The Mechanical Contractors Association sued J.G. Rivard Ltd. in the Supreme Court of Ontario and attached hereto as Exhibit “E” is the [sic] a copy of the Writ of Summons, Statement of Claim, Statement of Defence, and Reply and Joinder of Issue.
6. The Reasons of the Supreme Court of Ontario in dismissing the claim are here attached as Exhibit “F”.
7. The Applicant, Mechanical Contractors Association of Ottawa appealed from the decision and a copy of their notice of appeal is hereto attached as Exhibit “G”. The Applicant abandoned its appeal which as a result was then dismissed as an abandoned appeal.
8. The Respondent has made known throughout that the Applicants do not represent it, it is not a member thereof and that the “industry fund” provisions are not properly part of any collective agreement but are simply a method of feathering the nest of the employers organization to which the Respondent does not belong. This issue was brought into contention and dealt with at length by the Honourable Mr. Justice Garrett of the Supreme Court of Ontario and it is respectfully submitted the matter is now res judicata.
9. In the alternative it is submitted that the bringing of this proceeding amounts to an abuse of the process of this Board even if one of the

Applicants was not a party in the Supreme Court of Ontario proceedings."

5. Prior to the hearing of this referral the parties requested and were granted leave of the Board to file written argument with respect to this matter.

6. For the purposes only of making their arguments, the respondents admitted that they were bound by the collective agreement referred to in paragraph two (except for Industry Fund contributions). The respondents drew attention to Schedule G of Appendix 13 of the collective agreement and noted that it provided in effect that every employer bound by the collective agreement was to contribute a number of cents per hour for every hour worked by each employee covered by the agreement to be made to the Mechanical Contractors Association Ottawa on the forms provided. The respondent asked the Board to note that the Mechanical Contractors Association Ottawa was not a party to the collective agreement and stated that the collective agreement was as a result of the designation sections of the Act and in particular sections 125 to 136 thereof.

7. The respondents characterized the grievances as between an employer's organization and an employer only and that neither an employee nor a union had an interest therein. The respondents conceded that the Mechanical Contractors Association Ontario, pursuant to section 131 of the Act, is the successor of the Mechanical Contractors Association Ottawa so far as industrial and commercial matters in the construction trade are concerned and stated that the Mechanical Contractors Association has since 1973 been attempting to collect "industry fund" dues from J.G. Rivard Limited. It was submitted that if the claim as against J.G. Rivard Limited fails, the claim against Michel Rivard Plumbing Limited would also fail.

8. The respondents stated to the Board that the Mechanical Contractors Association Ottawa previously brought (except for the period of time involved) an identical grievance as against J.G. Rivard Limited pursuant to section 112a of the Act and that the Board had dismissed that grievance for want of jurisdiction on September 22, 1976. The respondents informed the Board that the Mechanical Contractors Association Ottawa had sued J.G. Rivard Limited in the Supreme Court of Ontario for "industry fund" dues. An appeal taken by the Mechanical Contractors Association Ottawa to the Court of Appeal was abandoned and dismissed as an abandoned appeal. It was the position of the respondents that the "industry fund" provision contained in the collective agreement referred to in paragraph two is the same "industry fund" provision (save for amount) as is contained in all previous collective agreements where J.G. Rivard Limited was pursued by the Mechanical Contractors Association for payments thereto. It was the position of the respondents that at all material times, as pointed out in the reasons for judgment of Mr. Justice Garrett, J.G. Rivard Limited was not a member of the Mechanical Contractors Association Ottawa, and is not now a member.

9. The respondents submitted that it is still not open to an employer's organization to grieve as against an employer under the provisions of section 112a of the Act and relied on the decision of the Board dated September 22, 1976, which held that section 112a provides that "either party to a collective agreement between an employer or employer's organization and a trade union or council of trade unions may apply for a final and binding determination of a grievance, it is an inescapable conclusion that the section contemplates a grievance as constituting a dispute between the employer, etc. on the one hand, and the union, etc. on the other

hand.”. The respondents further submitted that since that decision the phrase “either party” has been changed to “a party” but none of the other sections of the Act referred to in the decision of the Board dated September 22, 1976, have been amended or changed in any way which would have a bearing on the interpretation previously given. The respondents referred to sections 1(e) and 125(e) of the Act with respect to the definition of a collective agreement and concluded that there are only two protagonists – an employer or an employers’ organization on the one hand and a trade union or council of trade unions on the other hand. It was the position of the respondents that just as section 112a of the Act could surely not be used by an employee to bring a grievance against his own union, then equally that section could not be used by either an employer or an employer’s organization to bring a grievance against the other.

10. The respondents adopted the position that if it is argued that section 134(3) of the Act constituted both employer and employer’s organization “a party” under section 112a, then it was submitted that this is for the purpose of allowing an employer to grieve against a union or *vice versa*, and not for the purpose of permitting internal grievances between employers and their own organization. The respondents also submitted that the decision of Mr. Justice Garrett decided that the “industry fund” was not properly part of a collective agreement and that since this point has been put in issue and has been decided adversely to the Mechanical Contractors Association it is now *res judicata*. In the alternative, it was argued that there is now a binding estoppel as against the Mechanical Contractors Association.

11. In the alternative, the respondents argued that if neither *res judicata* nor issue estoppel applied then to relitigate the same issue that was formerly decided by the Supreme Court of Ontario is an abuse of the processes of the Board and should be dismissed on this basis. The respondents stated that J.G. Rivard Limited has now been pursued for almost seven years concerning these industry fund dues and that there must surely be an end to the matter.

12. The applicants argued that the change in the language of section 112a from “either party” to “a party” constituted a basic amendment and that when that amendment was examined together with the provisions of section 134(3) of the Act, the procedural roadblocks which existed previously to the instant application had been removed. The applicants adopted the position that on the plain meaning of the wording of section 134(3), both the applicants and the respondents are to be considered to be “a party for the purposes of section 112a”. In the view of the applicants, this conclusion is reinforced by the fact that the collective agreement expressly provides under Article 17.2 that the Association may file a grievance against a contractor and that under Article 18.1, such a grievance may be referred to arbitration. The relevant parts of Articles 17.2 and 18.1 read as follows:

“17.2 Any difference arising directly between the Zone Association or Contractor and the Union, or between the Zone Association and the Contractor, as to interpretation, application, administration or alleged violation of this Agreement, that cannot be resolved by a meeting or conference between the parties involved, shall be submitted by registered mail in writing by either of such parties to the Board within four (4) regular working days of such difference. The written submission shall state the nature of the grievance, and pertinent provisions of this Agreement, and remedy sought.

18.1 In the event that any difference arising between any Contractor and any of the employees, or any direct difference between the Zone Association, or any Contractor and the Union or between the Zone Association and a Contractor, as to the interpretation, application, administration or alleged violation of this Agreement, including any question as to whether a matter is arbitrable, shall not have been satisfactorily settled by the Board under the provisions of Article 17 Grievance Procedure – hereof, the matter may be referred by the Zone Association, and Contractor or Union to arbitration for the final binding settlement as hereinafter provided, by notice in writing given to the other party within fourteen (14) regular working days from the submission of the matter in writing to the Board.”

13. The applicants argued that the doctrine of *res judicata* did not apply. The applicants stressed that the action in the Supreme Court of Ontario turned on the finding that there was no civil contract between the Mechanical Contractors Association Ottawa and J.G. Rivard Limited and that accordingly, there was no obligation for J.G. Rivard Limited to make payments. The applicants contrasted the instant application which is based on a claim that there is an obligation pursuant to a collective agreement and not a civil contract. It was the position of the applicant that the question before the Board had not been decided by the court. The applicants emphasized that by virtue of section 3(3) of *The Rights of Labour Act*, R.S.O. 1970, c. 416, the Supreme Court of Ontario could not rule upon the interpretation of the collective agreement.

14. In reply the respondents pointed out that the applicants had not addressed themselves to the point that section 112a, even as amended, does not permit grievances between parties who are really on *the same side*. The respondents argued that no assistance was to be gained from the collective agreement if section 112a did not apply and pointed out that the applicants are not proceeding under the grievance procedure dealt with in the collective agreement but have decided to proceed under section 112a. The respondents disagreed that the action was dismissed in the Supreme Court of Ontario merely because there was no civil contract.

15. The collection of industry fund dues from the respondents has been a matter of contention for some seven years. In 1973 a joint conference board was established under the provisions of a collective agreement between the Mechanical Contractors Association of Ottawa (“MCAO”), an accredited employer organization, and Local Union 71 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (“Local 71”) effective from May 1, 1973, to April 30, 1975. It was alleged that three employers (including J.G. Rivard Ltd.) bound by this collective agreement had failed to make certain specified contributions to the industry fund as provided for in the collective agreement. The issue before that board was whether the failure to make the specified contributions could properly be heard and determined in accordance with the grievance and joint conference board provisions of the collective agreement. The chairman of that board concluded that the joint conference board established to deal with a purported grievance by the MCAO against three named employers had no jurisdiction to hear and determine the matter. The chairman reasoned that the board had no statutory power under *The Labour Relations Act* and did not have power conferred upon it by the consent of those who might be bound by its decision. In addition, the chairman concluded that the purported grievances in

question were not “grievances” in the terms of article 17.1 and the Board had jurisdiction only to deal with grievances as defined in that clause. [Article 17.1 defined a grievance as “a signed claim in writing by an employer, by the union or by an employee that this agreement has been violated, misinterpreted or misapplied”.] Finally, the chairman concluded that the MCAO lacked standing under article 17.1 to initiate grievances on behalf of its employer members.

16. In 1976 the MCAO referred to this Board under section 112a of the Act a dispute between itself and J.G. Rivard Limited which the MCAO alleged arose out of a breach on the part of J.G. Rivard Limited of the terms of a collective agreement between Local 71 and the MCAO effective from May 1, 1975 to April 30, 1977. More specifically the MCAO alleged that J.G. Rivard had not made certain payments to the industry fund as provided for in the collective agreement. In discussing the reference in the *J.G. Rivard Limited* case, [1976] OLRB Rep. September 540, the Board stated:

“5. The respondent takes the position that the Board does not have jurisdiction under section 112a of the Act for the reason that the complaint of the applicant is not a grievance within the meaning of section 112a.

6. The respondent further objected to the Board hearing the matter on the grounds that an identical grievance had been instituted in 1973 by Mechanical Contractors Association of Ottawa, the applicant herein, against the respondent herein and two other companies. That grievance was dismissed for lack of jurisdiction by the Joint Conference Board hearing set up under the terms of the then existing collective agreement.

7. In addition, the respondent contended that the Board ought not to proceed, since the matter was presently before the courts and was on the ready list for trial in the Supreme Court of Ontario.

8. One of the reasons given by the Joint Conference Board for dismissing the “grievance” placed before it was that the Mechanical Contractors Association could not, under the terms of the collective agreement as it existed at that time, initiate grievances on its own behalf or on behalf of the employer members. The definition of a grievance contained in the collective agreement dealt with by the Joint Conference Board in the above arbitration was that a grievance was a signed claim in writing by an employer, by the union or by an employee, that the agreement had been violated, misinterpreted or misapplied.

9. In the agreement presently before this Board, the definition of a grievance was altered by the parties and now reads:

“A grievance within the meaning of this Collective Agreement shall mean a written claim in writing by Local Union 71 on its own behalf, by Local Union 71 on behalf of one or more of its members, or by any member or members of Local Union 71, by the MCA on its own behalf, by the MCA on behalf of one or more of the employers on whose behalf this agreement is signed, or by one or more of the said

employers alleging that this agreement has been violated, misinterpreted, misapplied, or has been improperly administered.”

10. The new definition, as is plain from its terms, enables the Mechanical Contractors Association to make a written claim on its own behalf and on behalf of its members alleging a breach of the collective agreement, a power which it obviously lacked under the former definition. The lack of this power was one of the reasons given by the Joint Conference Board for dismissing the prior grievance, the grounds being that since the Mechanical Contractors Association was not an employer, it did not meet the terms of the definition.

11. As we have already observed, the definition contained in section 16.2 of the agreement now clearly empowers the Mechanical Contractors Association to process a grievance either on behalf of the Association itself or on behalf of an employer, on whose behalf the agreement is signed. A question remains, however, and it is one central to the respondent’s case, and that is whether, even with the amendment, a grievance can be instituted by the Association against one of the employers who is covered by the collective agreement for an alleged violation or breach of the agreement. The respondent argues that neither under the collective agreement nor under the provisions of the Labour Relations Act can a complaint of one employer against a fellow employer who are signatories to a collective agreement constitute a grievance. That is to say that in this particular matter, a dispute between the Association and the respondent arising out of an allegation of failure of the respondent to pay dues to the Association is obviously not the kind of dispute to be dealt with as a grievance under the Act or the collective agreement.

12. Section 1(e) of the Act defines a collective agreement as follows:

“collective agreement” means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions, that, represents employees of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees.

13. Section 110, which is applicable in the present case, in providing that under certain circumstances a collective agreement shall be deemed to exist notwithstanding that there were no employees in the unit at the time the agreement was entered into, speaks of a collective agreement as being an agreement in writing between an employer or employers’ organization on the one hand and a trade union or council of trade unions. . . on the other hand.

14. Section 117(2) and section 118 speak of a collective agreement

between accredited employers' organizations and trade unions or councils of trade unions.

15. It is plain from the language used in these sections, that the parties to a collective agreement within the meaning of the Act are the employer or employers' organization on the one hand, and the trade union or association of trade unions on the other hand, that is to say, the Act recognizes a collective agreement as an agreement dealing with the rights of two groups with different interests. Consequently, when section 112a of the Act provides that "either party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions" may apply for a final and binding determination of a grievance, it is an inescapable conclusion that the section contemplates a grievance as constituting a dispute between the employer, etc. on the one hand, and the union, etc. on the other hand. It is therefore, only that type of grievance that permits the parties to a collective agreement to invoke section 112a and which alone gives the Board jurisdiction to act and reach a determination under the provisions of that section.

16. The present "grievance" is clearly not one brought by a party "on the one hand" against a party "on the other hand" as those terms are used in the Act to distinguish between the points of view or interests of the protagonists of the employer and of the union under a collective agreement. The Mechanical Contractors Association and the respondent are virtually the same party in that context. The union is obviously the party "on the other hand." Section 112a, in referring to "either party", obviously refers to the distinction between the employer's interest and the union's interest as represented by employers on the one hand and unions on the other.

17. The present dispute, notwithstanding the fact that it arises out of the wording of a collective agreement, is clearly a matter arising between two entities of like interest and constitutes an internal dispute between them, and not a dispute between "either party" to the collective agreement within the meaning of section 112a. The "grievance" is therefore not a grievance within the meaning of section 112a, and the Board has no jurisdiction to deal with the matter.

18. The referral is accordingly dismissed."

17. The decision of the Board was taken before the Divisional Court in the Supreme Court of Ontario by the MCAO. In a decision which was released on November 23, 1976, the Divisional Court dismissed the application and stated that it was in complete agreement with the Board's decision to decline to hear the referral made to it and the reasons set forth by the Board in declining jurisdiction.

18. On March 18, 1975, the MCAO commenced an action in the Supreme Court of Ontario against J.G. Rivard Limited and stated that its claim was "against the defendant for monies owing and due to the plaintiff pursuant to the terms of a collective agreement, for the

operation and management of an Industry Fund, during the period April 30, 1969, through to April 30, 1971, inclusive, and for the period May 1, 1971 through to April 30, 1973, inclusive, and for the present period commencing May 1, 1973, to April 30, 1975.” The sum claimed by the MCAO amounted to almost twelve thousand dollars. Mr. Justice Garrett released his decision on March 25, 1977, and held that there was no contract between the MCAO and J.G. Rivard Limited as to the payment of the industry fund charges and that the MCAO well knew at all times that J.G. Rivard Limited did not agree to pay such charges and the fact of its accreditation under *The Labour Relations Act* did not really bestow upon the MCAO any rights to recover the industry fund charges that it did not have before its accreditation. Mr. Justice Garrett did permit recovery on a claim for *quantum meruit* for a much smaller amount with respect to the negotiation of collective agreement by the MCAO on behalf of J.G. Rivard Limited. The MCAO filed a notice of appeal on April 7, 1977, and on April 25, 1978, the appeal was dismissed as an abandoned appeal. The MCAO and the Mechanical Contractors Association Ontario (the “applicants”) made the instant referral to the Board on January 15, 1980.

19. The applicants seek to recover industry fund dues under the provisions of section 112a of the Act. Since the decision of the Board in the *J. G. Rivard Limited* case, *supra*, certain changes have occurred. It appears that the MCAO has been supplanted in its position as bargaining agent for the respondents by Mechanical Contractors Association under a scheme of provincial bargaining and that the collective agreement which contains the provision respecting the industry fund is now a provincial collective agreement. In addition, there has been a change in the wording of section 112a and section 134(3) has been added to the Act. The change in the employer bargaining agent and the appearance of a provincial collective agreement are not of any significance to the issue of the Board’s jurisdiction. The Board now considers whether there has been a statutory change of such significance to the Act that a grievance within the meaning of section 112a includes a grievance between parties of like interest. The relevant sections of the Act are:

“134.(3) Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purposes of section 112a.

112a. (1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, *a party to a collective agreement between an employer or employers’ organization and a trade union or council of trade unions* may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement including any question as to whether a matter is arbitrable, to the Board for final and binding determination.” [Emphasis added]

20. Prior to 1977 section 112a read “either party” where it now reads “a party” but was identical in all other respects. Before the amendment to section 112a in 1977 the Board held in a series of cases that only an accredited employers’ association or a council of trade unions could properly bring a grievance or reply to a grievance under section 112a. See, for example, *The Lummus Company of Canada Ltd.* case, (Board File No. 1304-75-M, unreported decision), *The Electrical Power Systems Construction Association* case, [1976] OLRB Rep.

December 825; and the *Ainsworth Electric Co. Limited* case, [1977] OLRB Rep. July 399. These decisions were based on the fact that neither the individual employers nor the local trade unions were actual parties to the signing of the agreement though they were both bound by it. The only parties to the agreement were the accredited employers' association and the council of trade unions which bargained on behalf of both their members and the entities which they represented by virtue of the scheme of accreditation under the Act. This meant that the persons who were most directly affected by the collective agreement were unable to directly make a referral under section 112a. It may be argued that section 134(3) was enacted to meet these circumstances. Section 134(3) makes it clear that any employee bargaining agency, affiliated bargaining agent, employer bargaining agency (such as the Mechanical Contractors Association Ontario) and employer (such as J.G. Rivard Limited) bound by a provincial agreement shall be considered to be a party for the purposes of section 112a. In conjunction with the addition of section 134(3) to the Act, section 112a was amended so that "either party" was changed to "a party". "Either" implies one of two whereas after the amendment one of many may refer a grievance to the Board under section 112a. While it may not now be disputed that the Mechanical Contractors Association Ontario and J.G. Rivard Limited are now to be considered as parties to the provincial collective agreement, the question to be answered is whether this entitles one of them to refer a grievance against the other under the provisions of section 112a. The previous decision of the Board in the *J.G. Rivard Limited* case, *supra*, did not turn on the fact that J.G. Rivard Limited was not technically a party to a collective agreement. The basis for that previous decision makes it clear that in numerous sections of the Act a collective agreement is between parties of opposing interests and that only grievances between parties in either column might be referred to the Board under the provisions of section 112a. In our view, the amendment to section 112a and the enactment of section 134(3) did not affect anything more than a procedural change to ensure that all persons bound by a provincial collective agreement would have direct access to section 112a. The earlier reasoning of the Board in the *J.G. Rivard Limited* case, *supra*, was affirmed in the Divisional Court and, despite the amendments to *The Labour Relations Act*, the reasons set forth in that decision are still correct with respect to the substantive matters considered by the Board in that case.

21. The Board now considers the other arguments which were raised by the parties. The defence of *res judicata* and issue estoppel is not available to the respondents because the earlier referral to the Board was between different parties and did not involve claims for industry fund dues under the same collective agreement. Reference is made to the *Canadian General Electric Company Limited* case, [1978] OLRB Rep. April 384. The decision of Mr. Justice Garrett did not decide that the industry fund was not properly part of a collective agreement. Section 3(3) of *The Rights of Labour Act*, R.S.O. 1970, c. 416, provides:

"A collective bargaining agreement shall not be the subject of any action in any court unless it may be the subject of such action irrespective of any of the provisions of this Act or of *The Labour Relations Act*."

22. The Supreme Court of Ontario is without jurisdiction to determine a dispute which involves the interpretation of a collective agreement by virtue of section 3(3). See *Re Polymer Corporation and Oil, Chemical & Atomic Workers*, [1961] O.R. 176; *Drogt et al. v. Robson-Lang Leathers Ltd. et al.*, [1971] 3 O.R. 488; and *The Ford Motor Co. of Canada et al. and Facchinato et al.* (1978), 18 O.R. (2d) 581. The Board does not agree that the applicants' referral to the Board constitutes an abuse of process because the applicants in referring this grievance have relied on amendments to *The Labour Relations Act* and are claiming industry

fund dues under different collective agreements. The fact that J.G. Rivard Limited is not a member of either the Mechanical Contractors Association Ontario or the MCAO is immaterial to a referral under section 112a where a scheme of provincial bargaining and a provincial collective agreement form the basis of a referral. The Mechanical Contractors Association Ontario represents the respondents as a result of the operation of *The Labour Relations Act* rather than as an incident of a consensual arrangement.

23. Are the applicants foreclosed from pursuing their claim against the respondents? In the *Imperial Tobacco Products (Ontario) Limited* case, [1974] OLRB Rep. July 418, the Board referred to the decision of the High Court in *Regina v. Ontario Labour Relations Board ex parte Genaire Ltd.*, [1958] O.R. 637, and commented that the courts have directed the Board to construe liberally the substantive and remedial bases to the matters before it. At page 433 the Board stated:

“Furthermore, the fact that the complainants failed to “plead” these sections or any of the others mentioned in the preceding paragraph is not determinative. In this regard the courts have admonished the Board to “exercise any jurisdiction given to it under the Act, notwithstanding that a particular section of the Act is referred to in the formal application.”

In the light of this admonition, are there any substantive and remedial bases in *The Labour Relations Act* which the Board might construe liberally with respect to the referral before it? In our opinion this question must be answered in the affirmative.

24. In the *Imperial Tobacco Products (Ontario) Limited* case, *supra*, the Board noted that the company, the union and all of the individuals named as respondents are bound by the terms of a collective agreement as a matter of statute by section 42 of *The Labour Relations Act* which reads:

“A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.”

The Board reasoned in that case that if a deviation from the terms of a collective agreement can be substantiated it could be argued that the company, the individuals and even the trade union are in violation of section 42 of the Act and that this substantive section is available to complainants thereby grounding a request for relief under sections 79(1) and 79(4)(a) of the Act.

25. *The Labour Relations Act* contains certain provisions (sections 106 to 136) which specifically concern the construction industry. The counterpart of section 42 with respect to the construction industry is to be found in section 134(2) which provides:

“A provincial agreement is, subject to and for the purposes of this Act, binding upon the employer bargaining agency, the employers represented by the employer bargaining agency, the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency, the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and insti-

tutional sector of the construction industry referred to in clause e of section 106, and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.”

Section 134(2) is substantially to the same effect as section 42 and the reasoning of the Board in the *Imperial Tobacco Products (Ontario) Limited* case, *supra*, with respect to section 42 is equally applicable to section 134(2). Following the reasoning in that case, the non-payment of industry fund dues by an employer (which is provided for in a collective agreement) is a deviation from the terms of a collective agreement and an employer who is bound by such a collective agreement is in violation of section 134(2). The substantive provisions of section 134(2) are available to the applicants thereby grounding a request for relief under sections 79(1) and 79(4) of the Act.

26. The provision for the payment of industry fund dues is well established in the construction industry. The Board notes that the payment of such dues is based upon from seven to ten cents per hour for every hour worked by each employee covered by the collective agreement. Such payments are therefore based upon the degree of business activity of each employer who is bound by the collective agreement. In any event, section 136(2) of the Act a designated or certified employer bargaining agency is under a duty not to act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employers in the provincial unit of employers for which it bargains, whether members of the designated or accredited employer bargaining agency or not. The Board is therefore in a position to exercise a general supervisory role with respect to such representation.

27. More recently, but in the same vein as in *Regina v. Ontario Labour Relations Board ex parte Genaire Ltd.*, *supra*, Brooke, J.A. in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1976), 8 O.R. (2d) 103, when discussing a board of arbitration stated at page 108:

“Certainly, the Board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions and this whether by way of declaration of rights or duties, in order to provide benefits or performance of obligations on a monetary award required to restore one to the proper position he would have been in had the agreement been performed.”

28. The provision for the payment of industry fund dues in Schedule G of the collective agreement is very much a right, privilege or duty of an employer or an employers’ organization within the meaning of section 1(1)(e) of the Act which provides:

““collective agreement” means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or *the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees, and includes a provincial agreement;*” [emphasis added]

The provision for the payment of industry fund dues is analogous to a provision in a collective agreement for the check off and payment of dues to a trade union. There is a labour relations interest in ensuring the viability of employers' organizations and employer bargaining agencies. The payment of industry fund dues to such organizations and agencies provides a basis for their viability in the process of collective bargaining and in the administration and policing of collective agreements.

29. In the decision of the Supreme Court of Canada in *Syndicat Catholique Des Employes de Magasins de Quebec, Inc. v. Compagnie Paquet Ltee* (1959), 18 D.L.R. (2d) 346, Judson, J. speaking for the majority stated:

"The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes. The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all."

While Judson, J. was speaking about the relationship between an employer and its employees, in our view, his observations are equally applicable by analogy to the relationship between an employers' organization or an employer bargaining agency on the one hand and an individual employer on the other hand.

30. The matter is referred to the Registrar for continuation of hearing.

0122-80-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC;; Applicant, v. **Jean-Marc Lalonde Limited**, carrying on business as **Marché Lalonde**, Respondent, v. Group of Employees, Objectors.

Certification – Petition – Extension of terminal date sought to permit late filing of petition – Employer offering higher benefits prior to circulation of petition – Whether petition admissible – Whether voluntary

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J.D. Bell and H. Simon.

APPEARANCES: *Gordon D. Reekie and Jim Donnelly for the applicant; Edward H. Masters for the respondent; J.E. Langlois for the objectors.*

DECISION OF THE BOARD; July 16, 1980

1. This is an application for certification.
2. With respect to the bargaining unit the parties are in dispute as to whether the head

cashier and department managers exercise managerial functions and are therefore excluded from the bargaining unit as alleged by the respondent or whether they are employees for the purposes of the Act and fall within the bargaining unit as argued by the applicant. In view of the disagreement the Board appoints Ms. V. Robeson, Examiner, to inquire into and report to the Board on the duties and responsibilities of those persons falling within the disputed classifications. Apart from these positions the parties agree that the appropriate bargaining unit description would be, "all employees of the respondent at Alfred, Ontario, save and except store manager, persons above the rank of store manager, corporate officers, office staff, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period."

3. The Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the employee status of the persons in the above mentioned classifications. On the basis of the union's membership evidence the Board is satisfied that whether they are ultimately included in or excluded from the bargaining unit, more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on April 29th, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

4. A timely statement of desire in opposition to the union's application was filed with the Board. Because of the minimal overlap between persons who signed both a union membership card and the petition in opposition to the application, the Board would not exercise its discretion under section 7(2) of the Act and order the taking of a representation vote even if the statement of desire represented the voluntary expression of the views of its signatories.

5. At the hearing, however, counsel for the employees sought to file with the Board a second statement of desire in opposition to the application. Counsel recognized that the petition had not been filed with the Board within the time limits fixed by the Board, but argued that in the unusual circumstances of this case, the Board should exercise its discretion under section 57(2) of the Board's Rules of Procedure to enlarge the time limits established in Rule 48(1) for accepting evidence of objection to the certification of a trade union.

6. In view of the considerable overlap between persons who signed both the second petition and membership cards, the Board would exercise its discretion and order a representation vote if it were to find both that the petition is a voluntary expression of desire and that the circumstances justify an extension of the terminal date.

7. Pursuant to the objectors' request to introduce the second petition, the Board scheduled a hearing and entertained evidence and argument on the question of whether the Board should extend the terminal date for filing petitions and on the issue of whether the document itself represented the voluntary wishes of its signatories.

8. The Board's Form 5 "Notice to Employees of Application for Certification and of Hearing" was posted by the respondent grocery store on Thursday, April 24, 1980. Among other matters, the Form 5 indicates to employees that they may object to the application for certification if they so wish and explains that any evidence of objection must be received by the Board no later than the terminal date signified on the Form 5. While the Form 5 was posted

five calendar days prior to the terminal date, counsel for the petitioners argued that the Board should extend the terminal date to allow the instant petition because the Form 5 was in English only and the employees of the respondent are nearly 100 per cent francophone.

9. The respondent's place of business is in Alfred, Ontario in the county of Prescott and Russell. In both the village and the county between 85 and 95 per cent of the population is francophone. The testimony reveals that the employees all speak French to one another though customers may be served in English with varying degrees of competence. We note that among the employees who testified one was completely bilingual, one could not read or speak English, another could speak a little but could not read it; still another could read it and carry on a conversation as long as everyone spoke slowly. It is readily apparent on the evidence that the work force is not bilingual. Without taking a poll of all employees it is impossible to fix a percentage figure to those who are able to communicate adequately in English. The fact that the union meetings were conducted in French and the union organizer who spoke English only used a translator emphasizes, though, the extent to which the respondent's employees habitually communicate with one another in French rather than English and the inability of many to understand English.

10. Counsel for the petitioners contends that because the petitioners were unable to read English, it took them a considerable amount of time to ascertain the significance of the Form 5. The evidence in fact reveals that it was only at noon on the terminal date that they first received clarification of the rights set out on the Form 5. Mr. Claude Wolfe, a butcher at the respondent grocery store, testified that while he was able to circulate a petition on the terminal date, he was unable that day to obtain the signatures of all the employees who wanted to sign the document. To comply with the Board's time limits for receiving petitions, he sent the document with the six names he had obtained to the Board by registered mail on the terminal date. Mr. Wolfe testified that subsequently he and other employees who had expressed a desire to oppose the union sought further advice to see if they could submit further evidence of employee objection even though the terminal date had passed. Thereafter Mr. Wolfe circulated a second petition on which twenty-six signatures were affixed. It is this document which the objectors seek to place before the Board and for which they request the Board to extend the terminal date.

11. Mr. Wolfe gave evidence to the Board relating to the origination and circulation of both the timely petition containing six names and the second petition with twenty-six names. Both petitions are written in French so no question arises as to the ability of the employees to read the petition. The terminal date was on the Tuesday following a long weekend. Over the weekend several employees had learned from friends elsewhere employed the general nature of the rights set out in a Form 5. On Tuesday Wolfe was designated to call a particular person at a bank in Alfred to get further clarification. This he did. Following his phone conversation he and a couple of other employees devised the preamble to the petition. Wolfe testified that he witnessed a few persons sign the petition at lunch time and saw the remaining people sign later that afternoon. When it was completed another employee who did not testify mailed it to the Board.

12. Four days after the terminal date, Wolfe and three other employees went to see the individual from the bank who had, on the terminal date, informed them in French of the general contents of a Form 5. They wanted to know if there was anything more they could do to oppose the union as they felt they had not had enough time to properly complete the first petition. They then spoke with a lawyer. Mr. Wolfe testified that he, the person from the bank,

and an employee, Constant Millette, devised the wording for the second petition which was then circulated on the 5th, 6th and 7th of May. Afterwards they gave it to their lawyer who then brought it to the certification hearing on May 9th. The Board was provided with little evidence relating to the details of the manner in which the second petition was circulated over this three day period. The evidence does not reveal, for example, who had custody of the document throughout the period of time or where the signatures were obtained. Mr. Rheal Lalonde, the chief union organizer, testified that Constant Millette, who is the meat manager and one of the persons challenged by the respondent as being managerial, circulated the petition for at least part of the time.

13. Mr. Rheal Lalonde is another employee challenged by the respondent as being managerial. He testified that after receiving the Form 5 on April 23, 1980, the employer, who is Mr. Jean-Marc Lalonde (no relation to Rheal Lalonde) called a meeting at approximately 4:00 p.m. to discuss the application for certification. Included in the group convened were Mr. and Mrs. Jean-Marc Lalonde, their two sons, the secretary/bookkeeper (excluded from the unit), the clerk/truck driver (included in the unit), the department managers and head cashier (challenged by the respondent as being managerial) as well as others who are responsible for various areas of the store but are not challenged as being managerial. At least three employees who are unquestionably within the bargaining unit were called by the employer into the meeting. Depending on the outcome of the respondent's challenges there may have been as many as eight bargaining unit employees in attendance at the meeting on April 23rd.

14. Rheal Lalonde testified that in the initial portion of the meeting the owner, Jean-Marc Lalonde, with the Form 5 on his desk, stated that he was against the union and asked each person in the room whether he or she was for the union or against the union. The evidence indicates that at first the employees were silent but that when he indicated that they would sit there until they answered his question, Rheal Lalonde spoke. He told the owner that he himself was for the union. Seven other people who were there also stated that they supported the union. The secretary then wrote down their names.

15. After allegiances had been established, the owner entered into an exchange having the earmarks of a negotiating meeting. He asked Rheal Lalonde what the employees wanted and why they were dissatisfied. Rheal Lalonde responded that they wanted to work fewer hours, have more breaks and holidays and be paid more money. The owner and his two sons then left the room. When they came back Jean-Marc Lalonde said they would take things one by one and that he would tell them what he could give them and what he couldn't. By the end of the evening Jean-Marc Lalonde had produced a proposal which took the following form:

"Proposition de M. Lalonde à ses employés
[Proposition of M. Lalonde to his employees]

1. Il est proposé de changer le système de vacances de la façon suivante:
[It is proposed to change the system governing holidays in the following way:]

• • •
2. Il est proposé qu'un système de congés maladie et spéciaux soit établi comme suit:

[It is proposed that a system governing sick leaves and spécial leaves be established as follows:]

• • •

3. Assurance Groupe: L'employeur est prêt à payer 100% des primes de l'assurance groupe pour le plan qui existe présentement.
[Group Insurance: The employer is ready to pay 100 per cent of the group insurance premiums for the plan that already exists.]

• • •

4. • • •

5. Ces nouvelles clauses entreront en vigueur au moment où les employés auront dit non à l'Union ainsi que l'Ontario Labour Relations Board.

Personne ne sera remercié de ses services à cause d'avoir signé une carte de demande d'adhésion ou une demande de syndicalisation.

[These new clauses will take effect the moment the employees will have said no to the Union and to the Ontario Labour Relations Board.

No one will be thanked for his services because of having signed a request for membership or a trade unionism request.]”

16. The English translation of this proposal was obtained by one of the parties from a Court translator and has been accepted as accurate by the three parties to this proceeding. The union qualified its acceptance, however, by indicating its view that the more appropriate translation of the last sentence is, “No one will be fired or dismissed from his services for having signed a request for membership or a trade unionism request”. Having regard to the evidence and representation presented at the Board’s hearing, the Board accepts and adopts the modification to the translation proposed by the union.

17. After composing its proposal the owner then asked Rheal Lalonde to sign it. When Rheal Lalonde indicated that he could not sign on behalf of all the employees who had signed union cards, Jean-Marc Lalonde said that he would call a meeting of employees the following evening at 7:00 p.m. Rheal Lalonde then decided to call a union meeting to begin an hour earlier at 6:00 p.m. Although by the next morning the owner had decided he would not be calling his meeting, Rheal Lalonde told him that he would read and explain the proposal to the employees at the union’s meeting. He told the owner that if a majority of employees were in favour of his proposal he would drop the union but that otherwise he would continue to support the union.

18. The evidence establishes that the large majority of people in the bargaining unit, or approximately 25 people, attended the meeting called by the union on April 24th. Rheal Lalonde read and explained management’s proposal. After some discussion all but four or five employees decided they wanted to continue with the union.

19. There is conflicting evidence as to whether the union at this meeting explained, in French, the contents of the Form 5 to inform employees that up until the terminal date they had the right to file a statement of desire in opposition to the union. In any event some five days later, the first petition was circulated; approximately 10 days later the circulation of the second petition was begun.

20. Persons seeking to rely on a petition in opposition to an application for certification bear the burden of establishing that the statement of desire indicating a change of heart is a voluntary expression. The Board has long recognized the sensitive nature of the employer/employee relationship in assessing the voluntariness of a petition which carries signatures of persons who shortly before supported the union. (See *Pigott Motors (1961) Ltd.*, 63 CLLC ¶ 16,264) Due to the suddenness of the change in sentiment, coupled with the responsive nature of the employer/employee relationship, the Board is watchful for indications of managerial involvement in assessing the voluntariness of a petition. In circumstances where management has been actively involved in the origination, preparation or circulation of the petition, the Board will generally not accord the document any weight. Additionally, where the evidence indicates that an employee might reasonably suspect that management supported the petition, tacitly or otherwise, thus raising concerns that management might become aware of who had and who had not signed a statement of desire in opposition to the union, the Board, similarly, will normally dismiss the petition. (See *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813; *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545; *Radio Shack*, [1978] OLRB Rep Nov. 1043 and the cases cited therein; *Peacock Lumber Ltd.*, [1979] OLRB Rep. May 423; *Terminal Hotel*, [1979] OLRB Rep. June 580 and *Groves Park Lodge*, [1980] OLRB Rep. Feb. 235).

21. The Board has carefully reviewed the evidence in this case and is not satisfied that either the petition circulated on the terminal date or the petition circulated from May 5th to May 7th represents the voluntary wishes of the signatories.

22. No specific allegations of employer misconduct were made by the union and the Board makes no finding in this respect. In assessing the voluntariness of the petition, however, the Board cannot ignore the effect that the employer's meeting on April 23rd may have had on the ability of employees to voluntarily signify in writing that they no longer wished to be represented by a trade union.

23. Even if the employer ultimately succeeds with all of its challenges to the list of employees in the bargaining unit, at least three people at the employer's meeting were unquestionably within the bargaining unit. Rheal Lalonde gave his evidence in an extremely straightforward and convincing manner and the Board accepts his uncontradicted account of what took place at the May 23rd meeting. After declaring his stance against the union, the employer asked those in attendance to state, for his secretary to record, those among them who were for the union and those who were against it. The Board concludes that a reasonable employee would have been intimidated by such questioning from his employer and would have reasonably developed a fear that his job might be in jeopardy if he did not oppose the union. Accordingly the Board is not satisfied that the persons who attended this meeting and thereafter signed one or both of the petitions did so freely and without fear for the security of their jobs.

24. The next day the employer's proposal was read in French by Rheal Lalonde to a

large majority of employees. The proposals consist of promises of more beneficial terms of employment conditional on the employees dropping the union and staying away from the Labour Relations Board. The proposal concludes with the undertaking that no one will be fired because he originally signed a union card or requested a union.

25. In the circumstances of this case the Board concludes that these conditional promises of increased benefits would undermine the ability of an employee to freely decide whether or not he wanted to belong to a trade union, a right guaranteed to all employees by section 3 of *The Labour Relations Act*. If an employer promises to give increased favours only on the condition that the employees drop the union, an employee would reasonably conclude that he would withhold benefits if he were to continue his allegiance to the union. (See the Board's decision in *J & A Cartage Limited*, [1980] OLRB Rep. Mar. 327.)

28. Of even greater impact on the employees was the employer's undertaking at the end of his list of conditional promises that if the employees dropped the union and accepted his proposals he would not fire any who had originally showed allegiance to the union. In the Board's opinion an employee hearing this undertaking would reasonably be concerned that if he didn't drop the union he might in fact be fired.

27. While recognizing that the adverse effect of the employer's proposal might have been minimized slightly when it was read at a union meeting and in the absence of the employer, the Board, nonetheless, readily concludes that employees hearing their employer's promises set out in a formal proposal signed by him would become concerned that continuing their allegiance to the union would jeopardize their job security.

28. Added to the problems created by the evidence relating to the meetings of May 23rd and 24th is the deficiency of evidence noted in paragraph 14 above concerning the precise circumstances under which the second petition was circulated. The Board has repeatedly insisted that to satisfy itself that a petition is a voluntary expression it must be presented with *viva voce* evidence of the document's origination, the manner in which it was circulated, where it was circulated, its continual custody and how it was sent to the Board. Significant gaps in the evidence have caused the Board to dismiss a petition (see, for example, the Board's decisions in *Mac-Wood Machine Limited*, [1975] OLRB Rep. Nov. 842; *Trench Electric Limited*, [1976] OLRB Rep. April 163 and the cases cited therein and *Trench Electric Limited*, [1976] OLRB Rep. April 170).

29. On the basis of all the evidence and for the reasons given above the Board concludes that neither the first nor second petition represents the voluntary wishes of the employees. The Board therefore declines to accept the sudden change of heart reflected on the face of the documents in opposition to the union as satisfactory grounds for causing the Board to order the taking of a representation vote. Accordingly, the Board relies fully on the membership evidence filed by the union.

30. In view of the Board's disposition of the petitions it is unnecessary for the Board to decide whether the facts of this case would cause it to extend the terminal date.

31. There was some suggestion at the hearing that the Form 5 should in the circumstances of this case be re-posted. The Board, however, heard the merits of a petition that was

filed ten days after the terminal date and signed by the large majority of employees in the bargaining unit. We conclude, therefore, that no appropriate interest would now be served by re-posting the Form 5. Furthermore any petition that might result from a re-posting could not be viewed in a vacuum and would have to be evaluated against the background of the two petitions disposed of in this decision.

32. Pursuant to its discretion under section 6(1a) of the Act and pending the final resolution of the composition of the bargaining unit and the employee status of the individuals in question, the Board certifies the applicant as the bargaining agent for all employees of the respondent at Alfred, Ontario, save and except store manager, persons above the rank of store manager, corporate officers, office staff, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period and, pending the final determination of the matters in dispute excluding as well the department managers and head cashier.

33. A formal certificate must await the final determination of the appropriate bargaining unit.

0549-80-U United Rubber, Cork, Linoleum and Plastic Workers of America, (hereinafter referred to as URW), Complainant, v. Kodiak Crane Corporation, Respondent.

Discharge for Union Activity – Board ordering reinstatement with compensation and interest – Directing posting of notices

BEFORE: N.B. Satterfield, Vice-Chairman and Board Members J.A. Ronson and H. Simon.

APPEARANCES: *Maureen Kenny and William Punnett for the complainant; no one appearing for the respondent.*

DECISION OF THE BOARD; July 18, 1980

1. This is a complaint filed under section 79 of the Act in which the complainant has alleged that the respondent has discharged the grievor, Paul Gable, contrary to the provisions of sections 56, 58 and 61 of *The Labour Relations Act*. The particulars of the complaint also contained allegations that the respondent had engaged in conduct which interfered with the rights of employees declared in section 3 of the Act.

2. The respondent, who was given notice of the complaint and of this hearing in respect thereof in accordance with the Board's Rules of Procedure, was not present or represented at the hearing notwithstanding the requirements of section 79(4a) of the Act which apply to a complaint of this nature and which are:

“On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this

Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

3. The Board heard the complainant's evidence and, having regard to that evidence and the undernoted decisions of the Board:

Windsor Airline Limousine Services Limited, [1980] OLRB Rep. Feb. 272;

I.C.B. Warehousing Division of Alar-Anson, [1976] OLRB Rep. Oct. 621;

A.A.S. Telecommunications Ltd. and Zipcall Ltd., [1976] OLRB Rep. Dec. 751; and

Four B Manufacturing Ltd., [1977] OLRB Rep. Feb. 116;

all of which deal with the effect of the reverse onus in section 79(4a) of the Act on proceedings pursuant to section 79, the Board finds as follows.

4. On or about May 23, 1980 the respondent gave its tacit approval to an employee to circulate freely amongst the employees while a member of management was in close attendance for the purpose of determining whether or not employees were interested in being represented by a trade union and documenting their stated preferences.

5. The grievor, who was active in organizing support for the complainant amongst employees of the respondent, had arranged for a meeting to be held on Sunday, May 25th which some 19 employees had indicated to him an interest to attend. Only two employees appeared for the meeting, one of whom was the grievor.

6. On or about May 26th, the grievor was laid off by the respondent, purportedly for lack of work.

7. Having regard to the grievor's activity on behalf of the complainant, to the respondent's awareness of the complainant's organizing campaign as inferred by the respondent's conduct referred to in paragraph 4 above and the failure of the respondent to adduce any evidence to satisfy the Board as to the real reason for termination of the grievor's employment, the Board concludes that the respondent terminated his employment because of his lawful activities on behalf of the complainant contrary to section 58(a) of the Act.

8. The Board further concludes that the respondent's involvement in the determination and documenting of the employees' preference in respect of being represented by a trade union both by itself and together with the grievor's termination of employment constitutes a violation of section 61 of the Act and that the cumulative effect of the respondents' two actions constitutes as well a violation of sections 56 and 58(c).

9. The Board therefore orders that:

- (a) The respondent reinstate forthwith the grievor, Paul Gable in employment in the same job in which he was employed at the time of its termination and under the same terms and conditions which applied to that job;
- (b) the respondent fully compensate the grievor Paul Gable for all wages and benefits lost through the respondent's termination of his employment in violation of the Act;
- (c) the respondent pay interest on the compensation for the lost wages as directed in item (b) above, such interest to be calculated in the manner described in the Board's decision in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35;
- (d) the respondent cease and desist from discriminating against its employees because they are members of or support the complainant;
- (e) the respondent and its employees, officers and agents cease and desist from interfering with its employees' formation and selection of a trade union or their representation by the complainant; and
- (f) the respondent, its employees, officers and agents cease and desist from seeking by intimidation to compel its employees to refrain from becoming a member of the complainant.

10. The Board further orders that the respondent post copies of the attached notice marked "Appendix", after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the project shall be given by the respondent to a representative of the complainant so the complainant can satisfy itself that this requirement of posting is being complied with.

11. The Board retains jurisdiction in order to deal with any dispute which may arise with respect to compensation.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY DISCHARGING PAUL GABLE AND BY SEEKING TO DETERMINE WHETHER OUR EMPLOYEES WISHED TO BE REPRESENTED BY A TRADE UNION.

THE LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS;

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT DISCHARGE ANY EMPLOYEE BECAUSE HE HAS SELECTED THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA TO BE HIS EXCLUSIVE BARGAINING AGENT.

WE WILL OFFER TO REINSTATE PAUL GABLE.

WE WILL PAY PAUL GABLE FOR ANY EARNINGS HE LOST AS A RESULT OF HIS DISCHARGE, PLUS INTEREST.

RODIAK CRANE CORPORATION
PER: (AUTHORIZED REPRESENTATIVE)

DATED: JULY 24, 1980

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

0329-80-R Patrick R. Burge, Applicant, v. Union of Canadian Retail Employees, Local 1000A chartered by the United Food and Commercial Workers International Union, Respondent, v. **More Groceteria Limited**, Intervener.

Petition – Termination – Petition circulated by employee who directs other employees – Employees circulating blank petitions after application and petition filed – Whether voluntary

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members H.J.F. Ade and C.A. Ballentine.

APPEARANCES: *Patrick Burge, Sandy Heimpel and Randy Parrack for the applicant; Paul Cavalluzzo, Dan Gilbert and Mike Shuster for the respondent; Douglas R. More for the intervener.*

DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER H.J.F. ADE; July 31, 1980

1. The name "Union of Canadian Retail Employees Local 1000A" appearing in the style of cause of this application as the name of the respondent is amended to read: "Union of Canadian Retail Employees, Local 1000A chartered by the United Food and Commercial Workers International Union."
2. This is an application under section 49(2) of *The Labour Relations Act* for a declaration terminating the respondent's bargaining rights.
3. The intervening employer, More Groceteria Limited ("More Groceteria") operates a grocery store in the City of London. The premises currently being used by More Groceteria were previously used by Loblaws Limited ("Loblaws") as a grocery store. The employees of Loblaws working at this location were covered by a collective agreement between Loblaws and the respondent trade union. In November of 1979 More Groceteria entered into a sub-lease with Loblaws with respect to the property and in December of the same year opened for business. On January 23, 1980 the respondent trade union made an application to the Board under section 55 of the Act (File No. 1972-79-R) alleging that there had been a sale of a business by Loblaws to More Groceteria and that More Groceteria would bound by the collective agreement between Loblaws and the trade union.
4. In dealing with the section 55 application, the Board in a decision dated April 8, 1980 outlined the following facts relating to the staffing of the store subsequent to its transfer from Loblaws to More Groceteria:

"12. When the respondent(s) (i.e. More Groceteria) opened the store, five full-time employees and six part-time employees were employed. it is common ground between the parties that all Loblaws employees who had worked at the subject premises were transferred to other Loblaws stores under a guarantee of employment clause contained in the subject collective agreement."

In its decision, the Board concluded that More Groceteria had purchased a part of Loblaws'

business and that pursuant to section 55 of the Act More Groceteria was bound by the collective agreement between Loblaws and the trade union.

5. This application was filed by Mr. Patrick R. Burge. In support of the application there was filed a statement of desire in opposition to continued representation by the trade union signed by all of the employees of More Groceteria.

6. The union challenged the voluntariness of the statement of desire. The evidence establishes that the statement of desire was drafted by Mr. Burge acting on his own initiative and that Mr. Burge approached other employees to get them to sign it. The evidence also establishes that employees signed the statement in More Groceteria's lunchroom and in its parking lot, and that no employee was approached to sign the statement in the presence of management.

7. Counsel for the union contended that the statement of desire was not voluntary because Mr. Burge is either managerial, or is likely to be perceived as such by the other employees. Mr. Burge is the only employee who works in the store's produce department on a full-time basis. Mr. Burge refers to himself as "the produce manager" a title which he readily admitted he bestowed upon himself. When other employees work in the produce department Mr. Burge instructs them as to what needs to be done. There is, however, no evidence before us which would indicate that Mr. Burge has, or might reasonably be perceived as having, either any true decision-making authority or the ability to affect the employment status of others. Accordingly, we do not think that employees would have signed the statement of desire out of a belief that Mr. Burge was managerial.

8. Subsequent to the filing of the application and statement of desire, the Board forwarded to both More Groceteria and the trade union, for their information, a copy of the statement of desire. In accordance with Board practice, on these copies the names and addresses as well as the signatures of the employees had all been whitened out and in their place added the notations "12 names and addresses" and "12 signatures". Upon receipt of a copy of this document Mr. More, the owner of More Groceteria, listed on it the names and addresses of the company's 12 employees and then approached each of them to sign their names to it. Mr. More then forwarded the document to the Board. Mr. More explained that he had followed this course of action because he understood from the document that the Board was seeking this information from him. As already noted, these events occurred subsequent to the filing of the application and statement of desire and accordingly the employees could not have been influenced by Mr. More's actions when they signed the statement of desire.

9. Counsel for the union contended that employees would have been influenced by the fact that in connection with the proceedings under section 55 of the Act Mr. More distributed documents to the employees to sign. In fact what Mr. More distributed was copies of the reply to the section 55 application which were completed by the individual employees and then forwarded to the Board.

10. On the evidence before us, we are satisfied, on the balance of probabilities, that the statement of desire likely does reflect the voluntary wishes of the employees who signed it. In this regard we would note that this case differs in a material respect from those cases where the Board has considered an anti-union "petition" filed during the course of an application for certification. In those cases the Board has had to concern itself with the voluntariness of a

petition against a trade union signed by the very same employees who had shortly before applied to become members of the union. The timing of such a purported "change of heart" gives rise to a natural concern as to its voluntariness. In the instant case, there is no corresponding change of heart. The employees who had worked in the Loblaw's store and who had been represented by the union were all transferred to other Loblaw's stores under the terms of the collective agreement between Loblaw's and the union. More Groceteria hired all new employees. There is no evidence before us to suggest that any of these new employees were ever members of, or represented by, the respondent trade union.

11. Having regard to the above, we are satisfied that not less than 45 per cent of the employees in the bargaining unit represented by the respondent trade union at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on May 21, 1980, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of *The Labour Relations Act* to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 49(3) of the Act.

12. We direct that a representation vote be taken among the employees in the relevant bargaining unit. Those eligible to vote are all employees of More Groceteria Limited in London, Ontario below the rank of store manager and bakery manager, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

13. Voters will be asked to indicate whether or not they wish to be represented by the respondent trade union in their employment relations with More Groceteria Limited.

14. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER C.A. BALLENTINE:

1. I dissent from the majority decision as I am not satisfied that the statement of desire reflected the voluntary wishes of the employees.

2. I believe it is reasonable for the employees to perceive Mr. Burge, the organizer of the statement of desire, as a person exercising managerial responsibilities. I refer to paragraph 7 of the majority decision:

"Mr. Burge is the only employee who works in the store's produce department on a full-time basis. Mr. Burge refers to himself as 'the produce manager' a title which he readily admitted he bestowed upon himself. When other employees work in the produce department Mr. Burge instructs them to what needs to be done."

Whether Mr. Burge bestowed the title of "Produce Manager" on himself or not, it is reasonable to assume that other employees look upon him as the "Produce Manager" who is in the position of giving orders to them and having influence over them.

3. The facts before the Board clearly demonstrate that Mr. More, the owner,

circulated documents and had them signed by the employees in the manner described in Paragraphs 8 and 9 of the majority decision. I cannot accept that Mr. More was acting out of an ignorance of the law. In my opinion, his actions were meant to coerce the employees into opposing the union.

4. I would have dismissed this application because I am not satisfied that the employees have voluntarily desired to terminate the union's bargaining rights. Furthermore, the vote will not allow the employees to freely express their wishes because of Mr. More's overt conduct.

2222-79-R Homida Ali, Applicant, v. Local 2078 of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.), Respondent, v. Ontario Hospital Association (Blue Cross), Intervener.

Termination – Timeliness – Whether no-board report and strike permitting timely termination within one year of certification – Sections 49 and 53(1) establishing one year minimum – Section 53(3) extending time period only

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members G. Donnelly and M. J. Fenwick.

***APPEARANCES:** Fred J. Matthews, James W. Weppler and Homida Ali for the Applicant; Lennox A. MacLean, Q.C., Carl Anderson, Joe Maloney and Clare Meneghini for the respondent; Douglas K. Gray and George Ubels for the intervener.*

DECISION OF THE BOARD; July 16, 1980

1. The name "United Auto Workers Local 2078" appearing in the style of cause of this application as the name of the respondent is amended to read "Local 2078 of the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.)".

2. This is an application under section 49 of *The Labour Relations Act* for a declaration terminating the respondent's bargaining rights. The application was dismissed orally at the hearing as well as in a brief written decision released immediately thereafter. What follows are the reasons for the decision to dismiss the application.

3. On March 14, 1979 the Board certified the respondent trade union on an interim basis under section 6(1a) of the Act to represent certain employees of the intervener. A conciliation officer was subsequently appointed to assist the parties in their attempts to negotiate a first collective agreement. After the officer's endeavors proved unsuccessful, the Minister on June 15, 1979 issued a "no board" report indicating that he would not be appointing a conciliation board. On or about September 24, 1979, the employees in the bargaining unit commenced a lawful strike. The strike was still continuing when this application was filed on February 22, 1980.

4. The relevant statutory provisions of the Act are set out below:

“49.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

53.-(1) Subject to subsection 3, where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made until,

- (a) thirty days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator; or
- (b) thirty days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board; or
- (c) six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled,

as the case may be.

• • •

(3) Where a trade union has given notice under section 13 and the employees in the bargaining unit on whose behalf the trade union was certified as bargaining agent thereafter engage in a lawful strike or the employer lawfully locks out such employees, no application for certification of a bargaining agent of, or for a declaration that the trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made,

- (a) until six months have elapsed after the strike or lock-out commenced; or
- (b) until seven months have elapsed after the Minister has released to the parties the report of the conciliation board or mediator or a notice that the Minister does not consider it advisable to appoint a conciliation board,

whichever occurs first.”

5. Counsel for the applicant contended that since the employees had engaged in a law-

ful strike, the only relevant time limits were those set out in section 53(3) and accordingly the one year limitation from the time of certification referred to in section 49(1) had no application. On the basis of this contention, counsel submitted that the application was timely in that it had been filed after seven months had elapsed from the time the Minister had indicated that he would not be appointing a conciliation board.

6. Subject to section 53, section 49(1) of the Act has the effect of ensuring that a trade union will be given a full year from the date of its certification in which to seek to negotiate a first collective agreement free from any timely attempts to terminate its bargaining rights. Section 53(1) provides an exception to this general time period by ensuring that this one year period will, if necessary, be extended so that a union's immunity from a timely termination application will be continued during the conciliation process and for a further period of thirty days thereafter. It is clear on its face that section 53(1) can only serve to extend the one year period, and cannot reduce the period to less than a year. Section 53(3), which only comes into play where employees engage in a lawful strike, provides yet another exception to the general time limit set out in section 49(1). Although section 53(3) does not on its face state that it can only serve to expand, and not contract, the one year period of protection accorded to a newly certified union, having regard to the clear intent manifested by section 49(1) and section 53(1) of providing for such a one year period, we are satisfied that section 53(3) should not be interpreted so as to allow this time span to be shortened. We would note that this conclusion appears to be consistent with the reasoning of the Board in the *Canron Limited* case, [1977] OLRB Rep. June 336.

7. We are satisfied that section 53(3) cannot have the effect of reducing the one year period provided for in section 49(1) during which a newly certified union is protected from a timely termination application. The instant application was filed prior to the passage of a year from the date that the respondent trade union was certified, and, accordingly, the application was dismissed as being untimely.

2246-79-U Mario Moreira, Complainant, v. Labourers' International Union of North America, Local 506 and Labourers International Union of North America, Respondents, v. **Ontario Hydro**, Intervener.

Duty of Fair Representation – Union refusing to place complainant on out-of-work list – Grounds for refusal based on fine being imposed contrary to union constitution – New grounds for refusal unrelated to earlier ones advanced – Whether bad-faith

BEFORE: N.B. Satterfield, Vice-Chairman.

APPEARANCES: *W. Baerg for the complainant, Chris Paliare, Michele Gargaro, S. Gilbert Cragg and K. Green for the respondent; Wm. O'Neill, J.G. Knight and E. Eshpeter for the intervener.*

DECISION OF THE BOARD; July 7, 1980

1. Ontario Hydro appeared at the hearing and was made a party to the proceedings. At the request of the respondent Ontario Hydro Nuclear Project, with the consent of the complainant and absent any opposition from the two other respondents, Ontario Hydro Nuclear Project was deleted as a respondent to the complaint and accordingly is deleted from the style of cause in this matter.

2. The complainant alleges that he has been dealt with by the respondents contrary to the provisions of sections 60, 60a and 61 of *The Labour Relations Act*.

3. At the hearing into this matter, the complaint was not pursued in respect of section 61 of the Act and insofar as that section is concerned the complaint is dismissed. Counsel for the respondents raised a preliminary issue as to the Board's jurisdiction to entertain the section 60 complaint and further requested that the Board dismiss the complaint in respect of section 60a (and for section 60 should the Board seize jurisdiction) on the grounds that the complainant had not exhausted the remedies available under the constitutions of the Labourers International Union of North America ("the international union") and its Local 506.

4. Counsel's challenge in respect of the section 60 complaint is founded in the fact that, at the times material to the complaint, the complainant was not "an employee in the bargaining unit" within the meaning of section 60. Counsel referred to the Board's decision in *Arthur Joseph Roberts*, [1974] OLRB Rep. Mar. 169. In that case, the Board was also dealing with a complaint that a trade union had acted in a manner that was arbitrary, discriminatory or in bad faith in the administration of a hiring hall provision of a collective agreement in respect of one of its unemployed members. The Board found that a trade union's section 60 duty of fair representation did not extend to members in good standing who are not employees in a bargaining unit and declined jurisdiction to proceed. That decision was made prior to the coming into force of the present section 60a of the Act. While the situations in the two cases are analogous, the instant complaint is based on allegations which related primarily to the complainant's eligibility for referral by the respondent Local 506 to available work, a situation falling squarely within section 60a of the Act. For this reason the Board chose to proceed under section 60a. The proceedings in respect of section 60 are terminated, therefore.

5. The Board denied the request of counsel for the respondents to dismiss the com-

plaint because the complainant had not exhausted the constitutional remedies available to him and as well the Board declined to defer to the unions' constitutional process. Although the Board did not state its reasons at the hearing they were as follows. Even if the Board had chosen to give way to the respondents' constitutional process, it would not have dismissed the complaint but would have retained jurisdiction to assure that the outcome of that process was an adequate resolution of the complaint. In this respect, see the Board's decision in *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418 at paragraph 34, wherein the Board decided to defer to arbitration in dealing with an alleged violation of section 60 of the Act, but retained its jurisdiction and awaited the outcome of the arbitration. Moreover, having regard to the content of the complaint and the fact that the complainant's livelihood in his trade was at issue, the Board was not satisfied that the respondent's constitutional process would have been as equally expeditious as the Board's nor could the Board be satisfied that adequate relief would be available under the respondents' constitution; the intervener does not have access to the process and it does not entitle the complainant to adduce evidence under oath. In these circumstances, the Board deemed it advisable to proceed under the Act to hear the complaint.

6. The complainant was the only witness to testify in support of the complaint. At the end of his examination by both counsel, counsel for the respondents asked that the complaint be dismissed because it had not been filed in a timely fashion and that his delay could not be excused on grounds of lack of knowledge of the Board's procedures since this was the third complaint filed by the complainant against the respondents since May 1978. The Board heard the representations of both counsel on the request, reserved its decision and heard the case on its merits. Counsel for the respondents' argued that the complainant's failure to file his complaint in a timely fashion prejudiced the respondents' ability to organize and prepare its evidence. Counsel was particularly concerned about the lapse of time since early January 1980 when an officer of Local 506 is alleged to have made statements to the complainant in front of other members on which the complainant is relying to establish his claim. Counsel contends that this delay has diminished the ability of the respondents' witnesses to recall accurately this event. The Board's practice in dealing with delay in section 60 complaints is stated in the following terms in *Concrete Construction Supplies*, [1979] OLRB Rep. Aug. 739, wherein the Board was dealing with a minimum delay of eight months from the time when the complainant may have realized that he had cause for a complaint.

"It is not the practice of this Board to bar complaints under section 79 unless there has been extreme delay. In the case of complaints involving alleged violations of section 60, the Board's practice has usually been to hear the complaint and consider delay, if it is unreasonable, when considering the relief to be given."

The Board concluded that the delay was not extreme in that case and that it would not bar the complaint from being heard. In the instant case, the complaint was filed March 3, 1980, barely two months after the event with which counsel for the respondents expressed concern and little more than two weeks after the last event in the complainant's allegations. Having regard for these circumstances and the Board's practice as stated in *Concrete Construction*, *supra*, the Board denies the request to dismiss the complaint. The hearings into the instant complaint were held on April 1st and May 2, 1980.

7. The Board heard evidence from two witnesses for the respondents in addition to

that of the complainant. They were John Cardoza and Kenneth Green. Cardoza is dispatcher for Local 506 and responsible for dispatching members from its hiring hall to the available jobs as new requests from employers are received. Green is secretary-treasurer of the local. The evidence of the three witnesses contained some significant differences and contradictions. Having assessed all of that evidence, the reliability of the witnesses' recall of events, their demeanor and relative credibility, where the respondents' evidence is in conflict with that of the complainant, the Board relies on the respondents' evidence with one exception explained later in this decision.

8. The complainant works in the construction industry as a construction labourer and has been a member of Local 506 since 1973. He was laid off from an Ontario Hydro construction project July 12, 1979 and the next day registered on the Local's out-of-work list. He was assigned a number in accordance with the union's customary practice. Between that date and the end of 1979, while the complainant only worked another two days (not for Ontario Hydro), I am satisfied that the evidence as to the events during that time and as to the conduct of the complainant and the respondents' officials does not support a complaint that the respondents have, or either one of them has violated section 60a of the Act.

9. On or about January 7, 1980, the complainant went to the Local's hiring hall to pay his monthly dues. Cardoza, acting on prior instructions from Michele Gargaro who is business manager of Local 506, refused to accept payment of dues from the complainant and, according to the complainant, refused to put him back on the out-of-work list. Cardoza maintains the complainant sought only to be put on the "back list", a special list for out-of-work members that operates in conjunction with the out-of-work list to give members on the back list preference for available jobs over those on the other list. The back list exists primarily to take care of members who accept work referrals of very short duration or who, while on the out-of-work list, were unable to accept a referral for special reasons such as illness. The Board prefers the complainant's evidence on this issue because the Board finds it to be more consistent with the whole of the evidence on the events at issue than the respondents' evidence. Green, whose office adjoins Cardoza's with an open doorway between them, intervened and explained to the complainant that the refusal was a temporary decision until a ruling was obtained from the general secretary-treasurer of the international union. There is no evidence that the complainant was told why his dues were being refused. That official's ultimate ruling was that no member's dues could be refused unless the member was properly charged, tried and found guilty of an offence under the union's constitutions and by-laws, whereupon Local 506 again accepted dues from the complainant.

10. Gargaro's decision to refuse the complainant's dues in the first instance was triggered by a newspaper report two or three weeks before the January 7th event that the complainant had been convicted of fraud against a welfare trust fund of the respondents. It is undisputed that there was a conviction and that it was appealed immediately. Officers of Local 506 had nothing to do with instigating the charges leading to the conviction. Green was concerned that this action might not be in accordance with the constitution and asked for a ruling from the general secretary-treasurer. This was the basis for Green's intervention when Cardoza told the complainant that his dues were being refused and for the explanation that the refusal of the dues was a temporary decision.

11. On or about January 11, 1980, Gargaro filed charges against the complainant alleging violation of the constitutions of the international union and Local 506 on grounds of

alleged misconduct in April 1979 wholly unrelated to his conviction for defrauding the trust fund. Specifically, Gargaro charged that the complainant had slandered him on April 3, 1979 in front of other members by calling him a crook, "Mafia" and accusing Gargaro of selling to another member a job referral to which the complainant believed he was entitled and that he had repeated the insults and accusation in a telephone call to Gargaro on April 5th. These were alleged to be a violation of Article 3, Section 3 of the Uniform Local Constitution of Local 506. Gargaro charged that the complainant had violated also Article XVI, Section 2 of the International Constitution by filing with this Board two separate complaints on April 30, 1979 and July 23, 1979 alleging violation of section 60 of the Act. While some eight months had elapsed between the alleged slander and filing of the charges, the unions' constitutions impose no time limit for the filing of charges. The complainant was duly notified of the charges by registered letter dated January 17, 1980 and of the hearing into them which was held on January 28, 1980. He chose not to attend, was found guilty of the charges and fines were levied against him. A copy of the minutes of the hearing, including the findings and the penalty imposed, was sent to him with a transmittal letter dated February 14, 1980. These minutes record that the Trial Board of Local 506 found the complainant to be guilty as charged and levied fines of \$500.00 each on the two charges of slander (i.e. April 3rd and April 5th) and directed that he compensate Local 506 for its legal costs for its defense of the two complaints which had been dismissed by the Board after hearing.

12. Meanwhile, on January 15th, an office employee of Local 506 had issued a transfer slip to the complainant. The next day he went to Local 183 of the international union to transfer into that local. In the meantime, Green had learned of the issuance of the transfer slip and notified an official of Local 183 that charges were outstanding against the complainant. In these circumstances, under the constitution of the international union the complainant was not eligible for transfer and Local 183 refused to accept his transfer slip.

13. Prior to the hearing of this matter the Trial Board took advice from legal counsel, reconsidered its decision and decided:

- (a) not to impose on the complainant the legal costs incurred by Local 506 on the two dismissed section 60 complaints; and
- (b) to reduce the fines levied in respect of the other violations to a combined total of \$100.00.

The complainant and the Board were notified of this change on March 24, 1980, by letters of the same date. The effect of the fines remains the same, however, and that is to cause the loss of his "good standing" status as a member of Local 506 and the international union until such time as he pays them. Without good standing he is ineligible to go on the out-of-work list of Local 506 for referral to available work and he continues to be ineligible for transfer to any other local of the international union. This has the effect of excluding him from being employed in his trade in a major segment of the construction industry. There is no evidence before the Board that the complainant was on the out-of-work list of Local 506 after his last referral to work or that he applied to be put on the list and was denied that right between his last work referral and having his dues refused on January 7th.

14. Section 60a of the Act provides as follows:

"Where pursuant to a collective agreement, a trade union is engaged in

the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.”

The purpose of the section is evident from its wording; that is, to protect persons from arbitrary, discriminatory or bad faith acts of a trade union which, under the terms of a collective agreement, is involved with referring those persons for employment. It is an important protection, particularly in the construction industry where various employment referral systems, popularly called “hiring halls”, have prevailed for many years. Persons employed in construction trades in the unionized segment of the construction industry depend substantially on these hiring halls for sharing equitably in the work available for their trade, the degree of dependency varying with the extent of unionization of the trade. To the extent also that employers can obtain manpower on short notice from hiring halls to meet their fluctuating requirements, they also benefit from hiring hall operations. Concern over the operation of hiring halls is with the potential for abuse which exists when a union official decides whether a member is entitled under the hiring hall rules to be referred to available work. Statutory protection of the sort expressed in section 60a of the Act comes into play in those infrequent cases where union officials, by means of acts which are discriminatory, arbitrary or in bad faith, remove, restrict or tamper with the rights of persons to be referred to employment through the hiring hall system.

15. In the case at hand the Board is not dealing with a question of improper referral, including failure to refer, to employment from the Local 506 hiring hall, rather it is dealing with the removal of the complainant’s eligibility to be on the out-of-work list. The removal of his eligibility has resulted from internal procedures under the respondents’ constitutions. While this Board has no specific authority under the Act to undertake any sort of watch-dog role over a union’s internal processes under its constitution and by-laws, the Act clearly gives it authority to determine whether a union had breached its section 60a duty. This in turn may require the Board to examine the union’s conduct under its constitution and by-laws. While the Board is reluctant to invade the internal procedures of a trade union, it does so when it becomes essential to the exercise of the Board’s authority and responsibility under the Act. See for example, the Board’s decision in *George Zebrowski*, [1977] OLRB Rep. Mar. 143, in which the Board reviewed the procedures followed by the trade union under its “Constitution and Laws” in expelling the complainant from membership in the union, as a consequence of which the complainant was discharged from his employment. Another example of the Board finding it necessary to review a trade union’s internal procedures is found in the Board’s decision in *Rupert S. Martin*, [1977] OLRB Rep. Oct. 671. The Board in that case, in order to determine whether section 60a of the Act had been breached, reviewed the internal decision-making process by which the respondent trade union decided not to refer the complainant to any employers who were seeking to employ members of the respondent through its hiring hall. In that same decision the Board dealt also with a question of whether one officer of the trade union had authority to make the decision not to refer the complainant to employment. In dealing with that issue, the Board acknowledged that it “. . . , does not have the authority to police union constitutions and by-laws.” and then stated:

“This is not to say, however, that where a union’s constitution or by-laws have been deliberately flouted or where certain steps have been taken notwithstanding a challenge that they might be in violation of the con-

stitution or by-laws, that those actions might not be a relevant factor in determining whether or not a breach of section 60a has occurred.”.

In a like manner, the Board finds it essential in the circumstances of the instant case to review how the complainant was dealt with by Local 506 under its constitution and by-laws in order to determine whether there has been a breach of section 60a of the Act.

16. The facts in this case as outlined above reveal that officers of Local 506 refused to accept the complainant's dues and to put him on the out-of-work list without advising him of the reasons for these actions. (It was only when the complaint triggered by the actions led to the hearing into this matter that the complainant learned of them.) Then Gargaro, upon learning that his actions were contrary to the constitution, filed the aforementioned charges against the complainant on grounds wholly unrelated to the reason advanced at the Board's hearing for the initial refusal to accept his dues and to put him on the out-of-work list. The charges were filed and proper notice of them and of the hearing into them was given to the complainant, all in accordance with the constitutions. The complainant declined the opportunity to attend the hearing and be heard.

17. While the officers of Local 506 may have had good reason for not filing charges against the complainant under its constitution as a result of the fraud issue and for waiting eight months after his alleged misconduct for which he was charged, none were given to the Board. In the absence of any reasons or explanation for these circumstances, the Board is left to conclude that the two actions were related and had the single purpose of removing the complainant's right to be referred to employment through the Local 506 hiring hall. In other words, when Gargaro could not make the dues refusal stick, he looked around for some other way to achieve the same end and filed the charges referred to above. Had the Local 506 Trial Board not decided to rescind its decision with respect to the complainant's two earlier section 60 complaints before this Board, that decision would have been the basis for finding a violation of section 71(2) of the Act. With that element of the charges against the complainant removed, there remains only the two “slander” charges. At the time the insults and accusations were directed at Gargaro by the complainant they could well be viewed as a proper cause of action under the constitution. With the passage of time, however, it seems to the Board that the injurious effect of the complainant's actions are lessened and eight months later one wonders what injury remains; in the Board's view it would be little and strengthens the conclusion that the real reason for the charges was to remove the complainant's good standing status. The Board therefore finds the filing of the charges after an eight months delay to be an arbitrary and a bad faith exercise of the respondent's powers under their constitutions. Consequently, the Board finds that the respondents have acted arbitrarily and in bad faith in removing the complainant's eligibility for referral from the Local 506 hiring hall and therefore have acted in a manner that is contrary to the provisions of section 60a of the Act.

18. The Board, therefore orders and directs the respondents to forthwith rescind the remaining fines and restore the complainant's “good standing” status as a member of Local 506 and the international union and with it the same rights, duties and privileges which apply to any other member in good standing of Local 506 and the international union. Reinstatement is to be effective from the date when the complainant's good standing status was withdrawn.

19. The Board further orders and directs that the respondents compensate the com-

plainant for lost earnings opportunities since January 7, 1980, when he was first denied access to the out-of-work list of Local 506 and that the complainant and respondents meet and attempt to agree on the appropriate compensation. The Board will remain seized with this matter in the event that the parties are unable to reach agreement on compensation.

1435-79-U Graphic Arts International Union, Local 28-B,
Complainants, v. **Rolph-Clark-Stone Packaging**, Ronalds-Federated
Limited, Respondents.

Duty to Bargain in Good Faith – Cease and desist order issuing earlier – Employer meeting and requiring settlement of certain issues before discussing economic matters – Whether failing to comply with original order (Decision inadvertently omitted from June report)

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members R.D. Joyce and H. Simon.

APPEARANCES: *H. Goldblatt and C. Buhler for the complainants; John P. Sanderson, Q.C. and John Adams for the respondents.*

DECISION OF THE BOARD: June 25, 1980

1. The parties are agreed that no remedy is sought against F.P. Publications Limited, and the style of cause is amended by deleting F.P. Publications as a respondent herein.

2. The Board, in its decision of January 8, 1980, [1980] OLRB Rep. Jan. 93, made the following order:

“35. The Board orders the respondent to meet with the complainant Local 28-B and endeavour by a process of bargaining consistent with this decision, to bargain in good faith and make every reasonable effort to make a collective agreement.

36. The Board further directs that the parties request the services of a mediator in order to assist them in achieving a collective agreement.”

3. By letter directed to the Board and dated March 21, 1980 the Complainant, Local 28-B, served notice of its desire to enforce the above order as an order or judgment of the Supreme Court of Ontario. The Complainant's letter reads:

“In its decision of January 8, 1980, the Ontario Labour Relations Board ordered that the Respondent, Rolph-Clark-Stone Packaging, meet with the Complainant, Local 28-B, and endeavour by a process of bargaining consistent with its decision to bargain in good faith and make every reasonable effort to reach a collective agreement. The Complainant, Local 28-B, submits that the Respondent has failed to comply with

the Board's order. Accordingly, and pursuant to the provisions of section 79(5), the Complainant, Local 28-B, wishes to enforce the determination of the Board as an order or judgment of the Supreme Court of Ontario.

The Complainant respectfully requests that a 'show cause' hearing be scheduled as soon as possible in this matter at which the Respondent's non-compliance might be established. Attached hereto is a Statement of Particulars upon which the Complainant intends to rely at such hearing."

4. There is no dispute that both parties have complied with the Board's direction contained in paragraph 36 above. The complainant alleges that the respondent's conduct at a meeting on February 4, 1980, called by the Mediator, was not in compliance with the Board's order contained in paragraph 35 above.

5. It is necessary to summarize the history of the negotiations, as they are recorded in the Board's decision of January 8, 1980, between the parties in respect to renewal of collective agreements which expired December 31, 1978.

6. The complainant and the respondent were parties to two collective agreements made by the Council of Printing Industries of Canada on behalf of designated employers, including the respondent, and the complainant. That agreement became effective January 1, 1978 and ran through to December 31, 1978. The respondent withdrew from contract renewal negotiations conducted by the Council in respect to that agreement, and served notice that it would bargain in respect to the covered bargaining units on a single company basis. In previous renewal negotiations of 1977 and 1978, the structure of bargaining was for the respondent to first conclude an agreement with Local 12-L representing certain other employees of the respondent and then to proceed to conclude negotiations with the complainant, Local 28-B.

7. Renewal negotiations between the respondent and Local 12-L reached an impasse, resulting in a strike becoming effective on May 4, 1979. Members of Local 28-B then refused to cross the Local 12-L picket line and requested the respondent to meet and bargain with Local 28-B in respect to its contract renewal demands. The respondent then refused the request to meet, characterizing it as "ludicrous". There were meetings between the respondent in August 1979 leading to a complete proposal being made by the respondent and which, at the insistence of the respondent, was placed before the Local 28-B membership and rejected on August 15, 1979. On August 18th the respondent commenced advertising for help.

8. On October 15, 1979 the respondent (who had up until then been bargaining "jointly but separately" with three other employer) refused a proposal for settlement advanced by Local 12-L. On October 29, 1979 a complaint was filed by both Local 12-L and Local 28-B alleging contraventions by the respondent of section 14 of the Act. The Board's order of January 8, 1980 was based on that complaint.

9. Following the filing of the complaint, the respondent and Local 12-L and Local 28-B met on November 6th, 8th and 19th. The Company insisted that the meeting be comprised of representatives of both bargaining units. On November 6th Local 28-B tabled a new proposal for settlement to which the respondent did not respond in the meetings of November 6th, 8th and 19th.

10. On February 4, 1980, following the Board's order, the parties met with a Mediator at which time the respondent, through its spokesman, John Adams, tabled a proposal headed "Company position as of February 4, 1980" and which read as follows:

- "1. Deletion of Article 33 (Non-Craft) and Article 39 (Craft – picket line clause.
2. Article 30 (Non-Craft) and Article 36 (Craft) to be deleted and rewritten as follows:

'No Strikes – No Lockouts

.01 In view of the orderly procedures established by this agreement for the settling of disputes and the handling of grievances, the union agrees that, during the life of this agreement, there will be no strike, picketing, slowdown or stoppage of work, either complete or partial and the company agrees that there will be no lockout.

.02 The company shall have the right to discharge or otherwise discipline employees who take part in or instigate any strike, picketing, stoppage or slowdown, but a claim of unjust discharge or discipline may be the subject of a grievance and dealt with as provided in Article 29(35) of this agreement.

.03 Should the union claim that a cessation of work constitutes a lockout, it may take the matter up with the company at Step No. 3 of the grievance procedure.

.04 The union agrees that it will not involve any employee of the company, or the company, either directly or indirectly in any dispute which may arise between any other employer and the employees of such other employer.'

3. Deletion of Article 31 (Non-Craft) and Article 37 (Craft) – struck work clause.
4. Article 22 (Non-Craft) and Article 17 (Craft) to be deleted and rewritten as follows:

'Regular Hours

The regular hours for all employees shall be 40 hours, both day and night shifts, with sole discretion for management to determine work schedules after due consultation with employees.'

5. Term of Agreement

Two years effective from the date of signing."

11. Adams states that, in tabling the proposal with Local 28-B representatives, he made the statement that those proposals would have to be resolved before the respondent could deal with economic issues. It is to be noted that the proposals relating to a 40 hour week and the term of the agreement are both clearly of economic impact, as Adams frankly conceded in his testimony. Charles Buhler, President of Local 28-B, testified that Adams' statement was to the effect that "these issues will have to be resolved before we can proceed" and which statement was repeated in reply to Buhler's further query as to whether, if those issues were resolved, the Company had any further proposals. The Board is satisfied that the respondent's position which was communicated to the complainant was that the respondent was not prepared to look at any items other than those proposed or to consider the Union's proposal of November 6, 1979 until those company proposals were resolved.

12. Local 28-B took the position that the proposals of February 4, 1980 were new issues which would require instructions from the membership, and the meeting of February 4th concluded. The Local 28-B membership subsequently rejected the Company's proposals and the Mediator so notified. No further meeting has been called by the Mediator, nor requested by either party.

13. The complainant argues that the respondent on February 4, 1980 established new significant pre-conditions to the discussions and that such conduct is a refusal to engage in rational, informed discussion as was required by the Board's order. The complainant further argues that the respondent's failure to enter into discussions of the Complainant's November 6th proposal, combined with its own February 4th proposals, was an effective disregard of all previous negotiations and therefore not in compliance with the Board's order "to bargain in good faith and make every reasonable effort to make a collective agreement".

14. The respondent argues that the effect of the Board's order of January 8, 1980 was merely to require the respondent to cease insisting on a joint bargaining structure between Local 12-L and Local 28-B. While the Board found that such insistence had led to a contravention of section 14 of the Act, the Board's order in connection therewith clearly has wider significance. Similarly, in the view which we take of the instant request, we do not find it necessary to examine into the respondent's argument that its February 4th proposals were justified by changes in the circumstances.

15. The duty of good faith bargaining imposed by section 14 of the Act and incorporated in the Board's order of January 8, 1980 was commented on in *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49 at p. 63,

"The duty reinforces the obligation of the employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential "unnecessary" industrial conflict."

16. The narrow issue here is whether the respondent's conduct complied with the Board's order "to bargain in good faith and make every reasonable effort to make a collective agreement". In our view, the respondent's insistence that the discussion be limited to those issues identified by it until solutions to those issues satisfactory to the respondent were achieved, limits the rational, informed discussion which the Board's order was intended to

foster. The respondent has therefore failed to comply with the Board's order of January 8, 1980.

17. The Registrar is directed to file in the office of the Registrar of the Supreme Court, a copy of the Board's determination of January 8, 1980, exclusive of the reasons therefor.

0837-79-U Teamster, Chauffeurs, Warehousemen and Helpers, Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant, v. **Russell MacVicar Limited**, Respondent.

Reconsideration – Failure to attend hearing due to misunderstanding between client and counsel – Whether grounds for reconsideration

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members B. Armstrong and J. A. Ronson.

APPEARANCES: *Stephen Krashinsky and John Impens for the complainant; Charles F. Clark and Henry J. Lamotte for the respondent.*

DECISION OF THE BOARD; July 7, 1980

1. This is an application under section 95 of *The Labour Relations Act* for reconsideration of a decision of the Board dated March 5, 1980. In that decision the Board set out its reasons for denying the respondent's request for an adjournment and, on the basis of the evidence before it, found that the respondent had illegally terminated four of its employees. By letter dated April 10, 1980 the respondent (by its solicitor, Charles F. Clark of the firm of McTague, Clark) requested reconsideration of that decision. The Board held a hearing on June 23, 1980 in order to hear the respondent's evidence and representations.

2. The respondent makes two submissions in support of its request for a new hearing. It is argued that the Board should have granted the respondent's original request for an adjournment, and that its failure to do so resulted in a denial of natural justice. It is further argued that the respondent failed to attend the first hearing because of a misunderstanding of its legal position, and confusion arising from the advice of its solicitors. On both grounds it is argued that the proceedings should be re-opened and reheard de novo. We propose to deal with these arguments seriatim, but before doing so it may be useful to refer to those portions of the Board's original decision which are relevant to the request for reconsideration. Paragraphs 2 to 8 of that decision read as follows:

"The complaint was filed on August 3rd, 1979 and, at that time, dealt with only two terminations. Subsequently the union learned that two other employees had been "laid off" and, by letter dated August 10th, 1979 the union requested an amendment to its complaint to add two further grievors. In accordance with its usual practice the Board appointed a

Labour Relations Officer to meet with the parties and attempt to effect a settlement. A hearing was scheduled for September 19th, 1979 and, in the meantime, settlement efforts proceeded.

A few days prior to the hearing date, the respondent's solicitor (from the firm of Bartlett and Richards, in Windsor) met with counsel for the union, in Toronto, and were able to reach, what they considered to be, an amicable resolution of the matters in dispute. It was agreed that the terms of this settlement would be reduced to writing, and that both solicitors would recommend acceptance to their respective clients. Meanwhile, the hearing was adjourned. Shortly thereafter, the trade union received a written document incorporating the proposed settlement, reviewed and executed same, and then waited for the respondent to do likewise. Since the discharged employees had not been able to find alternate employment, counsel for the union pressed the solicitor for the respondent for an early resolution of the matter. The solicitor for the respondent advised that, although he was making his best efforts, the respondent was unwilling to accept the proposed settlement.

By mid-December, the union concluded that Henry Lamotte, the president of the respondent, was simply disregarding the rights of his employees, the processes of the Board, and the advice of his own solicitor; and requested the Board to reschedule the matter for a hearing. The union also requested that the Labour Relations Officer make a further attempt to settle the case. Counsel for the union was subsequently advised that these further efforts by the Labour Relations Officer, and by the solicitors for the respondent, were to no avail. On January 31st, 1980 the respondent was sent a new notice of hearing fixing the hearing date for Friday, February 29th, 1980. A final settlement effort was made between the service of the new notice of hearing and the hearing date but it, too, proved unsuccessful.

Early in February Mr. Lamotte contacted the firm of Mathews, Dinsdale and Clark, in Toronto, with a view to retaining them with respect to these matters. Mr. J. D. Carrier, a member of the firm, spoke to Mr. Lamotte on February 11th, 1980 and with Mr. Lamotte's wife on or about February 14th, 1980. Mr. Carrier advised Mr. Lamotte of his understanding, that Bartlett and Richards were still the solicitors of record and that, in the circumstances, the Mathews, Dinsdale firm would not act and did not wish to be retained. Mr. Carrier's advice, *inter alia*, that he did not wish to act or be retained at that time, was confirmed by letter to Mr. Lamotte, dated February 14th, 1980. Mr. Carrier never met Mr. Lamotte, never received instructions, and as we have already pointed out, was never retained in any formal sense.

In the two days immediately preceding the hearing, following telephone conversations with the Assistant Registrar of the Board, Mr. Carrier learned that there might be some confusion, or misapprehension, on Mr. Lamotte's part concerning his legal representation. On Thursday, February 28th, Mr. Carrier spoke to Mr. Lamotte and was told that the respon-

dent would, in any event, be seeking an adjournment of the Friday hearing. Lamotte told Carrier that his brother had died on Sunday, February 24th, the funeral had taken place on Wednesday, February 27th, and that he was still in a state of shock and mourning and could not proceed with the hearing. Mr. Carrier (who is experienced in labour law matters and has frequently appeared before the Board) told Mr. Lamotte that: adjournments are not granted as a matter of course – particularly at such a late date; that the union might well oppose the request for an adjournment; and that he (Lamotte) should attend personally at the Board hearing, in order to speak in support of his request for an adjournment. As a courtesy to Mr. Lamotte, and because he was concerned that there still might be some confusion on Mr. Lamotte's part, Mr. Carrier spoke to counsel for the union on Thursday, February 28th, to relay the respondent's request for an adjournment. Mr. Carrier also appeared the following morning before the Board to communicate the same information. Despite Mr. Carrier's advice to him, Mr. Lamotte did not appear at the hearing.

The union opposed the respondent's request for an adjournment. The employees remained without work, and in the union's view, Lamotte had had ample opportunity to either settle the case or retain counsel to act on his behalf. After a brief adjournment, to allow counsel to contact the firm of Bartlett and Richards, in Windsor, counsel advised that that firm had told Mr. Lamotte, some time ago, that it was unwilling to act for him any longer. Moreover, the union led evidence demonstrating that, notwithstanding his brother's death, Mr. Lamotte had continued to carry on his ordinary business on the Monday and Tuesday immediately after the death, and on the Thursday following the funeral and immediately preceding the Board hearing. In the union's submission Mr. Lamotte's position was patently without foundation, and an attempt to mislead both Mr. Carrier and the Board.

In the circumstances, and having regard to the evidence before us, the Board was not satisfied that it should exercise its discretion to grant an adjournment in this matter. Following this ruling Mr. Carrier advised that, as he had not been retained, and had received no instructions with respect to the merits of the complaint, he would be withdrawing from the hearing."

3. At the hearing on June 23rd, Henry Lamotte, the owner of the respondent, gave viva voce evidence. Mr. Lamotte confirmed that his brother had died on February 24th and told the Board that because of his bereavement, he was unable to do any work that week. He visited the business premises only once, and then, only for the purpose of delivering some papers. He clearly, unequivocally, and repeatedly denied ever driving a truck during that week or doing any other manual work about the premises. On cross-examination however, he was confronted with an invoice bearing his signature and indicating that a load of sewage had been delivered to a sanitary landfill site in Essex County on February 25, 1980; that is the day (Monday) following his brother's death. Lamotte admitted the accuracy of this document, but then maintained that this was the only work which he performed. Subsequently the Board heard the evidence of John Impens and Robert Martineau, two employees of the respondent, who

were picketing the premises throughout that week. They testified that on the Monday and Tuesday immediately after his brother's death, and on the Thursday following the funeral and immediately preceding the Board hearing, Lamotte came to work as usual, changed into his coveralls, and continued to carry on his ordinary business activities. He was observed performing various tasks about the premises, driving the pump truck, and leaving the premises transporting a septic tank. The employees testified that because they were on strike and Lamotte was trying to maintain "business as usual," he was very busy and was engaged in a number of tasks which would normally be done by his employees. Having regard to the demeanour of the witnesses, the manner in which they gave evidence, and the credibility and consistency of the various versions of events, we have no hesitation in accepting the evidence of Martineau and Impens, and rejecting that of Lamotte. Indeed, we are satisfied that Lamotte has not been candid with the Board, and has intentionally misrepresented the facts.

4. Section 91(12) of the Act and Rule 57 of the Rules of Practice permit the Board to adjourn any proceeding where the Board considers it in the interests of justice to do so; and in appropriate circumstances a death in a party's immediate family may well provide grounds for an adjournment. In the present case however, Mr. Lamotte's sense of loss did not prevent him from going to work and carrying on his ordinary business as a sewer and drainage contractor on the Monday and Tuesday following his brother's death, and on the Thursday following the funeral and preceding the scheduled hearing date. The hearing itself did not conflict with his funeral obligations, and we are satisfied that in the circumstances no adjournment was warranted.

5. The second ground advanced by the respondent in support of its request for reconsideration, is an alleged misunderstanding by Mr. Lamotte concerning the necessity of his presence on the original hearing date. It is admitted that he received notice of the hearing and had ample opportunity to retain and instruct counsel. Mr. Lamotte argues, however, that there was some confusion concerning his selection of, and communications with, his solicitor, with the result, rightly or wrongly, that he formed the impression that an adjournment would be granted as a matter of course, and his presence at the hearing would not be required. Mr. Lamotte explained to the Board that he had become dissatisfied with his original solicitor's performance and had decided to retain new counsel. The firm of Mathews, Dinsdale and Clark was contacted in early February; but Mr. J. D. Carrier of that firm advised Lamotte by telephone, and subsequently by letter, that he was unwilling to act until Lamotte settled the outstanding account of his previous solicitor, and that solicitor resigned from the record. Lamotte told the Board that Carrier was "working for him" and had been retained to appear on his behalf at the original hearing (a fact which Carrier denied); but he admitted that no settlement of the previous solicitor's account, retainer, or payment of Carrier took place until well after the hearing. Nothing turns on the formalities of Carrier's retainer however, since Carrier appeared at the hearing and put the respondent's position as well as he could in the absence of Lamotte. Carrier told the Board at the first hearing that he had spoken to Lamotte by telephone the evening before, and had told him that an adjournment might *not* be granted and that he should be present in Toronto in case the Board decided to proceed with the case on the merits. Carrier said he didn't know where Lamotte got the idea that an adjournment would be granted automatically, but, in any event, he explained that this was not the case. Lamotte admits discussing the hearing with Carrier, but testified that he was told that there would be an adjournment. He told the Board he could not recall Carrier ever suggesting that an adjournment might not be granted as a matter of course; and he denies being advised to attend the Board hearing. Lamotte told the Board that he had made reservations to come to Toronto,

and that after his discussion with Carrier he decided not to come. His present predicament was characterized as his "lawyers' fault."

6. J. D. Carrier is an experienced solicitor who frequently appears before the Board in labour relations matters. We are satisfied that he advised Mr. Lamotte that an adjournment might not be granted, that the hearing might proceed on the merits and that he should be present at the hearing. It is difficult to see how a person who has conducted a successful business for some years could misunderstand these simple instructions. We are satisfied that Lamotte decided to ignore Carrier's advice (as he had ignored the advice of his previous solicitor) and take the chance that an adjournment would not be granted. Even if Mr. Lamotte bona fide, misunderstood his solicitor's instructions (and we repeat that we are not satisfied that this is the case) this in itself would not be sufficient to prompt the Board to rehear the matter. This is not a case in which the respondent's position is in any way attributable to the complainant or the processes of the Board. The Notice of Hearing was explicit and provides in bold type that "IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS." Counsel for the applicant did not at any time suggest that he would consent to a further adjournment. On the contrary, after considerable forbearance while Lamotte's previous solicitor pursued the possibility of a settlement short of litigation, he ultimately concluded that the matter could only be resolved by a hearing. The "misunderstanding," if there is one, lies solely with Mr. Lamotte himself; and it is well established that a mistake by a party or its counsel, which results in a failure to attend a Board hearing is not a ground requiring reconsideration of a Board decision or a rehearing of the original matter. (See *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *Soo Dairies Ltd.*, [1968] OLRB Rep. Mar. 1183). One of the principal purposes of an administrative agency is to process the matters that come before it with expedition and economy. This value can only be achieved if there is finality to the Board's decisions in the vast majority of cases. To rehear cases because one party made a mistake and neglected to attend a hearing would substantially impair this end. This is especially the case, where, as here, there has been clear notice and explicit instructions from a solicitor that the respondent should appear.

7. We have carefully considered the respondent's representations and are not satisfied that the Board's decision should be set aside or reconsidered. The respondent had ample opportunity to appear and make its submissions at the original hearing, and we do not consider it necessary to conduct a further hearing or hear the matter de novo. Accordingly, the application for reconsideration is dismissed.

1838-79-U Canadian Textile and Chemical Union, Applicant, v. Silknet Limited (Textile Division), Respondent, v. United Textile Workers of America, Intervener.

Discharge for Union Activity – Practice and Procedure - Board not deferring to arbitration where complainant alleging collusion between employer and intervening trade union – One grievor is foreman – Employer establishing terminations related only to bona fide decision to rationalize operation

BEFORE: M. G. Picher, Vice-Chairman, and Board Members B. Armstrong and F. W. Murray.

***APPEARANCES:** Frank Park, Stanley Hardman, John Taylor and Susan Harvie for the applicant; R. D. Perkins, H. F. Irwin and Allan Holvey for the respondent; Vernon Mustard and Ron Myslowka for the intervener.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; July 11, 1980

1. This is a complaint under section 79 of *The Labour Relations Act*. The complainant union alleges that the seven grievors were discharged by the respondent contrary to the provisions of sections 58, 61 and 70 of *The Labour Relations Act*. It requests their reinstatement into their former employment with compensation for wages and benefits lost.
2. Six of the grievors were employed as pipe fitters in the respondent's textile mill at Cambridge, Ontario. They worked in a division known as the pipe shop under the supervision of their foreman, Stanley Hardman who is also a grievor in these proceedings. The evidence establishes that on December 21, 1979, all of the grievors were terminated by the company. Their discharge came shortly after the conclusion of an unsuccessful attempt by the complainant union to displace the incumbent union in the plant, the United Textile Workers of America, the intervener in these proceedings. (Board File No. 1600-79-R, Feb. 5, 1980.)
3. The Canadian Textile and Chemical Union alleges that in the course of its certification campaign the employer and incumbent union conspired to defeat it and breached *The Labour Relations Act* to achieve that end. It further alleges that the employees and Mr. Hardman were discharged following the complainant's unsuccessful attempt at certification because the respondent, in league with the incumbent union, wished to eliminate any vestige of support or possibility of future activity on behalf of the complainant union.
4. The ultimate failure of the complainant's application for certification is not an issue in these proceedings. The alleged improper conduct of the employer and the incumbent union was raised by the complainant union in the form of a section 7a allegation in its application for certification. At the time of the representation vote the complainant union chose to withdraw its charges in that regard and to be bound by the result of the balloting. This complaint is not, therefore, a reconsideration of any of the issue raised in that application. The evidence adduced with respect to the certification campaign is relevant only as background which the complainant submits is necessary to understand the alleged common motive of the incumbent union and the respondent in the discharge of the grievors.
5. The respondent raised a preliminary objection to the complaint. At the time of their

discharge all of the grievors save Mr. Hardman were represented by the intervener union. It appears that the intervener has filed grievances on behalf of the six employees and those are proceeding before a Board of Arbitration. The respondent submits that the Board should therefore defer to arbitration in the circumstances of this case.

6. In the past the Board has tended to defer to arbitration when it appears that the complaint before it is essentially a dispute arising out of a collective agreement and where it is clear that the dispute has no implications that go beyond the four corners of the agreement. Disputes of that kind are generally best dealt through the dispute resolution procedure of arbitration either contained in the collective agreement or imposed by section 37(2) of *The Labour Relations Act*.

7. Where, however, the issues in dispute raise questions that go beyond the administration of the collective agreement different considerations apply. In *Kodak Canada Ltd.* [1977] OLRB Rep. Feb. 49, at p. 56, the Board stated:

“... once a dispute can be characterized as being something more than just a dispute relating to the interpretation, administration or alleged violation of a collective agreement, [the] general presumption [in favour of arbitration] must necessarily give way. Although grievance arbitration is the proper forum for the resolution of matters relating to individual collective agreements, it is the Labour Relations Board that has been entrusted with the responsibility for resolving matters that go to the general structure of collective bargaining in this Province. Where such matters arise, therefore, it is this Board that provides the proper forum for the resolution, and deferral to grievance arbitration can no longer be the appropriate response.”

(See also, *Truck Engineering Limited*, [1977] OLRB Rep. Jan 2; *New Gregory House*, [1977] OLRB Rep. Sept. 584).

8. Having regard to the nature of the allegations made in this complaint we are satisfied that this is not a case where we should defer to arbitration. The material filed raises clear allegations of collusion between the intervener union and the respondent employer. If that allegation is established and it should be found that the union and employer made common cause to rid themselves of the grievors there is little reason to accept that an arbitration between those same parties would give the grievors the kind of protection contemplated by the scheme of the Act. Moreover, a Board of Arbitration would hear a different complaint, dealing with whether the company, by contracting out the pipe fitting work, adhered to the collective agreement. That is not the issue in these proceedings. The illegality which the complainant alleges before this Board does not involve the interpretation of the collective agreement between the intervener and the respondent. It charges a conspiracy to defeat the rights of the employees and a union under the Act. It goes, therefore, to the heart of the collective bargaining process regulated by *The Labour Relations Act*. On that basis, it should be heard by this Board.

9. A further reason to decline to defer to arbitration in this case is the grievance of Mr. Hardman. The complainant alleges that he was discharged from his job as a foreman because he indicated a preference for the complainant union over the intervener. Not being a member of the bargaining unit he cannot have his discharge heard at arbitration. If, on the other hand,

it can be established that Mr. Hardman's discharge was prejudicial to the interests of the complainant union he may have an avenue of redress before this Board. (*A.A.S. Telecommunications Ltd.* [1976] OLRB Rep. Dec. 751).

10. For all of the foregoing reasons the Board is satisfied that it should not defer to arbitration in the face of the allegations before it.

11. When it is alleged that an employee has been dealt with contrary to the Act by his employer the respondent bears the burden of proving that it has not acted contrary to the Act in its actions regarding that employee. Where, as in this case, employees have been dismissed, the employer normally discharges that burden by coming forth with a full and credible explanation of legitimate business reasons, unrelated to anti-union sentiment, that were the basis for its actions. (*Barrie Examiner* [1975] OLRB Rep. Oct. 745). In this case the company's evidence was given principally by Mr. Allan Reginald Holvey, Vice-President of the Textile Division of the respondent in Cambridge. Mr. Holvey impressed the Board as a credible witness. He adduced in evidence documents to explain and support the respondent's submission that it laid off the pipe shop employees as a result of a company decision to contract out their work for reasons of business efficiency.

12. The respondent's textile operation is housed in a large building in Cambridge, parts of which are over 100 years old. Much of the equipment in the plant is powered by steam and compressed air delivered through an extensive system of pipes which requires constant maintenance and repair. Until December of 1979 that work was performed by the employees of the pipe shop.

13. In May 1979 Mr. Holvey decided to explore the possibility of contracting out the work performed by the employees in the pipe shop. Through the respondent's purchasing agent he contacted a local plumbing and pipe-fitting contractor, Nicholls & Radtke Associates Limited. On August 22, 1979, Mr. Holvey met with representatives of Nicholls & Radtke to finalize the terms upon which the private contractor was prepared to supply plumbing and pipe-fitting services to the respondent's plant. Shortly thereafter, on September 11, 1979, Mr. Holvey did his own rough calculation comparing the cost of operating the pipe shop within the company to the cost of contracting the pipe-fitting work to Nicholls & Radtke. His calculations indicated that there would be significant savings through contracting out. At this point Mr. Holvey decided in his own mind that the best course of action for the company was to close the pipe shop. His personal decision became a corporate decision on December 19, 1979 at a policy meeting which included the Chairman of the Board of the respondent and its President. The decision was then made to close the pipe shop as of December 21, 1979.

14. At the time this decision was being explored and taken by the company its Cambridge plant was the battleground of an intense inter-union rivalry. For years the respondent's employees had been represented by the United Textile Workers of America, Locals 354 and 347. From the late Spring of 1979 through the Fall the plant was the subject of an intensive organizing campaign to oust that union by the complainant Canadian Textile and Chemical Union. The campaign culminated in an application for certification filed with this Board on November 16, 1979. On December 13, 1979 a two-way representation vote was taken among the employees and the incumbent, The United Textile Workers of America, emerged as the winner.

15. The complainant's application for certification came at a time when the incumbent

union had begun to bargain with the respondent for the renewal of its collective agreement. The evidence is clear that there was much employee discontent both with the company and with the quality of the incumbent union's servicing of the plant up to that time. As a result of that concern and the pressure of the complainant's campaign The United Textile Workers of America conducted an intensive drive to consolidate its position among the employees in the plant. Between June and December of 1979 it held a number of meetings both inside and outside the plant to attempt to respond to the employees' concerns and regain their support.

16. The respondent's management was obviously not unaware of the conflict raging among the employees as between the two unions. Mr. Holvey was candid that he preferred to deal with the incumbent union, if only out of familiarity. It is clear that the incumbent took advantage of its access to the plant and the employees during the course of the certification campaign. The evidence does not establish, however, that the company openly or overtly favoured the incumbent union over the applicant in such a way as to unduly influence the employees.

17. The inter-union division among the employees was sharp. It is not disputed that all of the grievors save Mr. Hardman, the foreman, supported the complainant union. While Mr. Hardman was not directly involved he openly professed greater respect for the Canadian Textile and Chemical Union. The evidence also establishes that several of the grievors had distributed campaign literature at the plant gates on behalf of the complainant union. It is also clear, however, that employees from other departments did so as well.

18. The burden of the complainant union's submission is that because the pipe shop was a "hot bed of support" for The Canadian Textile and Chemical Union the company, in conjunction with the incumbent union, plotted to eliminate all of the employees within it. The probabilities of that argument are not, however, very firm on the evidence before this Board. Any action to purge the pipe shop employees could not, for example, influence the outcome of the certification campaign. When the grievors were discharged on December 21, 1979, the campaign was over and the representation balloting was finished.

19. Counsel for the complainant argues, nevertheless, that the interest of the company and the union was to eliminate any future dissidents among the employees. He submits the pipe shop was an especially appropriate target because its members moved about extensively through the plant and could influence employees in all departments. The evidence does not support that theory. The evidence establishes that two members of the pipe shop staff were kept on. One, Mr. Taylor, was kept on for compassionate reasons because he was close to retirement. The second, Mr. Brown was retained because of his knowledge of the jet-dyeing process and his rapport, apparently greater than Mr. Hardman's, with the employees in that department.

20. The undisputed evidence is that both Brown and Taylor were also supporters of the Canadian Textile and Chemical Union. There is nothing on the evidence to distinguish their allegiance from that of the grievors. Moreover, there is nothing in the evidence to confirm that the company knew with any certainty the union preference of each of the nine employees in the pipe shop.

21. Having regard to the totality of the evidence the Board accepts the testimony of Mr. Holvey that the decision to close the pipe shop and lay off the grievors was based entirely on the company's plan to rationalize its operations and implement savings in its maintenance costs. The Board cannot, on the balance of probabilities, conclude that the discharge of the

grievors amounted to either selective or wholesale discrimination against them because of their particular union sympathies. Nor can the Board conclude that the company's action, being an administrative decision in the normal course of business amounted to a breach of the section 70 freeze.

22. The complaint is, therefore, dismissed.

23. The Board's conclusion does not, however, in any way affect or limit such right as the grievors may have under their collective agreement. The right of the respondent to discharge the pipe shop employees in order to contract out the work previously done by the grievors is a matter exclusively for the Board of Arbitration that has been constituted to deal with that question. Being satisfied that there was no collusion or ill-will aimed at the grievors by the incumbent union we see no reason why that determination can not be made in due course by the tribunal constituted to hear it.

DECISION OF BOARD MEMBER B. ARMSTRONG:

1. I dissent.

2. The employer has not discharged the burden imposed upon it by Section 79(4a) that it has not acted contrary to the Act. It has failed to satisfy me that its decision to dismiss the grievors was prompted by a business reason and that it was unrelated to the grievors' support for the complainant union.

3. The evidence was clear that all the grievors were active supporters of the complainant union and that this fact was well known to the respondent. It is equally clear that the respondent was anxious to prevent the incumbent union being ousted by the complainant. There was ample evidence of the incumbent union receiving and exercising many privileges (which were not available to the complainant union) during the campaign preceding the representation vote. In fact, as the majority decision points out, Mr. Hardman admitted at the hearing that he preferred to deal with the incumbent union rather than with the complainant union.

4. This evidence, when coupled with the timing of the decision to close the pipe shop, seems to me to be more than mere coincidence. It becomes necessary then for the respondent to adduce strong evidence to show that business reasons, and business reasons alone, were behind the decision to close.

5. In my view the company has failed to discharge that responsibility. Contrary to what the majority decision states, the evidence showed that the decision to close was not done after a thorough investigation, as would be reasonable to expect. On the contrary, the decision was casually taken essentially by one individual.

6. On a balance of probabilities, I am not at all convinced that the decision was taken for legitimate reasons. The respondent has failed to discharge the onus under Section 79(4a).

7. I would order the grievors reinstated to their former employment with compensation for lost wages and benefits.

0218-80-R; 0275-80-R Retail Clerks International Union, Local 233F, Footwear Division affiliated with the Canadian Labour Congress and the AFL-CIO, Applicant, v. **Sisman's of Canada Limited**, Respondent.

Sale of Business – Physical assets and inventory acquired from Receiver – Similar operations commenced – Change in end product not establishing change in character of business – Section 55 declaration issuing

BEFORE: R. D. Howe, Vice-Chairman, and Board Members R. D. Joyce and W. F. Rutherford.

APPEARANCES: *Ian E. Reilly for the applicant; David I. Wakely, Allen Craig and Edward Rowe for the respondent.*

DECISION OF THE BOARD; July 10, 1980

1. The name: "Sisman's of Canada Ltd., owning and operating Hewetson Shoe Company, Brampton, Ontario Plant" appearing in the style of cause of these applications as the name of the respondent is amended to read: "Sisman's of Canada Limited."

2. This is an application under section 55 of *The Labour Relations Act* which was heard together with an application under section 1(4) of the Act. The applicant contends that the respondent, Sisman's of Canada Limited (hereinafter referred to as "Sisman's") is the successor of Hewetson Shoe Company (hereinafter "Hewetson") or that, in the alternative, Sisman's and Hewetson carry on associated or related activities or business under common control or direction.

3. For many years shoes have been manufactured at a plant located at 57 Mill Street North, Brampton, and sold under the name "Hewetson". This business commenced operation in the early 1900's and was purchased by the Shoe Corporation of America about 1970. Subsequently, it was sold to Mansfield Footwear Co. Limited (hereinafter "Mansfield"), a division of J. D. Carrier Shoe Co. Limited (hereinafter "Carrier"), which continued to use the "Hewetson" name for some of the casual and dress produced by it at that plant. The shoes produced by Mansfield were sold through independent shoe stores and through some chain stores.

4. The applicant and "Hewetson Shoe Company Brampton, Ontario Plant" entered into a collective agreement effective from November 3, 1977 to November 2, 1979 (and from year to year thereafter in the absence of notice of amendment or termination). Mr. Ian Reilly, a representative of the applicant, testified that notice to bargain for the renewal of this collective agreement was given by the applicant to Hewetson on September 13, 1979, and that on November 20, 1979, the applicant requested the appointment of a Conciliation Officer. However, no such appointment had been made as of the date of this hearing (June 16, 1980) because objections had been raised concerning the requested appointment.

5. In the summer of 1979, Carrier and Mansfield made public the fact that they were experiencing serious financial difficulties. The Canadian Imperial Bank of Commerce (hereinafter the "Bank") appointed Coopers and Lybrand (hereinafter "Coopers") as receiver,

manager and agent of Mansfield pursuant to the terms of a security agreement and a debenture held by the Bank as security for debts, liabilities and obligations of Mansfield to the Bank in respect of which Mansfield had defaulted. The Brampton plant continued to operate under the management of Coopers until the end of October 1979. At that time, the employees were laid-off or terminated.

6. Sisman's is one of the largest manufacturers of safety footwear in Canada. Steel toed and plated safety footwear constitutes 94% of Sisman's production. The remaining 6% includes production of police, service and other safety footwear. Sisman's sells 60% of its production through "safety houses" which specialize in selling safety footwear. The remainder of its production is sold through large chain stores. Prior to the transaction in question, Sisman's manufactured all of its footwear by using a welted construction in which the sole is stitched onto the welted material which goes around it. Welted safety footwear is manufactured by Sisman's at a plant in Aurora, at which the production employees are represented by Local P-486 of the United Food and Commercial Workers of North America. A two year collective agreement entered into on January 8, 1980 between Sisman's and Local P-486 recognizes that local as the exclusive bargaining agent for "all the employees in [the Sisman's] Aurora, Ontario, (York County) plant, save except foremen, persons above the rank of foreman, and office staff and persons regularly employed for not more than eight hours per weeks".

7. Mr. Edward Rowe, the President of Sisman's, testified that welted safety footwear constitutes 60% of the safety footwear market. As part of its plan to become the major producer of safety footwear in Canada, Sisman's decided to produce cemented safety footwear, which is less expensive than welted footwear and constitutes 40% of the safety footwear market. Accordingly, Sisman's leased from Coopers the premises (and surrounding parking lot) at 57 Mill Street North, Brampton, described in the lease as the "Hewetson Shoe Factory Building". The lease, which is dated January 21, 1980 and has a two year term, contains a covenant by Sisman's that the leased premises will not be used for any other purpose than that of a "shoe manufacturing business". Sisman's also obtained from Coopers an option to purchase the premises and property (in the nature of a right of first refusal) which option to purchase will remain in effect until January 17, 1982. Sisman's also purchased a large number of Mansfield fixed assets for \$190,000 by Bill of Sale from Coopers dated January 25, 1980. Sisman's subsequently sold through an auctioneer for \$80,000 certain of those assets for which it had no use. Sisman's also purchased \$19,000 worth of the Mansfield \$1,400,000 inventory of raw materials.

8. Sisman's commenced production at the Brampton plant in February of 1980. The bulk of the 33 persons employed by Sisman's at that plant were former employees of Mansfield. The Mansfield office employees who had been paid by Coopers to continue to work in the plant office from September 1979, to February of 1980, were also hired by Sisman's. However, none of the Mansfield management team was employed by Sisman's nor were any members of the Mansfield sales force. Rowe's evidence concerning production at the Brampton plant during the first months of operation was: "During this time period we were producing anything we could sell with that equipment — steel toe, a few items lying around the factory that we could make. We have ongoing costs. We needed the people there to be trained ..." He conceded in cross-examination that the casual shoes produced during this period could not have been manufactured without the Mansfield equipment purchased through Coopers. When asked by counsel for the applicant if it "would be fair to say that [Sisman's] purchased the assets of Mansfield and are making the product which Mansfield was making as a filler while gearing up for cemented safety boots", Rowe said: "That's a fair statement."

9. Although Sisman's did not purchase the name or goodwill of Hewetson or Mansfield, on February 25, 1980, Sisman's registered the name "Hewetson of Canada" under *The Corporations Information Act, 1976*. The registration indicates that "the business activity or service to be carried on in or identified by the registered name" is "manufacturing and sale of shoes and boots". In his testimony, Rowe expressed the opinion that "there is no goodwill attached to the name 'Hewetson' because of the problems they've had in the industry — quality problems, late deliveries, all kinds of problems". He stated that Sisman's uses the "Hewetson" name to provide a distinction in the industry between Sisman, which will produce welted safety footwear, and Hewetson, which will produce cemented safety footwear. However, the evidence of Reilly that the name "Hewetson" has been synonymous with shoes since 1910 was not refuted, nor was any explanation provided concerning selection of the name "Hewetson" rather than some other name.

10. To promote sales of the casual shoes which it was manufacturing in the Brampton plant from February to June of 1980, Sisman's purchased advertisements consisting of two full pages in the April-May issue of trade magazines including Footwear News. One page of the advertisement consisted of a photograph of management and staff captioned "the nucleus of Hewetson's new team building to-day for a better to-morrow", below which are listed the names and addresses of the new Hewetson's sales force. The other page consisted of a photograph of four styles of men's casual shoes and boots under the name "Hewetson of Canada, a subsidiary of Sisman's of Canada". The 57 Mill Street North, Brampton address for "Hewetson of Canada" was printed at the bottom of that page. Thus, Sisman's used the Hewetson trade name to cultivate the casual shoe market of the predecessor.

11. Since February of 1980, Sisman's has expended \$80,000 to modify equipment and retool the Brampton plant to produce cemented safety footwear. Mr. Henry Schmid, a recognized production expert concerning safety footwear, was hired to be the general manager of the Brampton plant and to retrain the workforce to produce cemented safety footwear. The retraining included teaching employees to perform "two pull lasting" (which Rowe testified is "entirely different" from the "one pull lasting" involved in producing causal and dress shoes); to use new dies, patterns and markers; and to insert box toes, steel toes and steel plates.

12. Rowe testified that 75% of the company's production at the Brampton plant will be cemented steel toed safety footwear, with the remaining 25% being non-steel cemented heavy-duty footwear. By mid-June of 1980, 70% of the plant's production was cemented steel toed safety footwear. The remaining 30% apparently consisted of casual footwear and non-steel cemented heavy-duty footwear.

13. Reilly testified from his experience in the shoe industry since 1956 that shoe companies are quite "fluid" in order to keep abreast with changes in supply and demand. It was his evidence that "the kinds of changes being made at Sisman's under the name 'Hewetson' are the normal kind of thing which happens in the shoe industry." This evidence was not refuted by the respondent although Rowe did testify that it had not been Sisman's practice to make such production changes.

14. There is no dispute in the instant case that a "sale" occurred. The disputed issue is whether what was sold constitutes a "business" (or "part of a business") or merely a sale of assets or other incidental elements of the business. *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, contains a detailed discussion of the history, purposes and application of section 55. In that case, the Board stated:

“29. A more difficult question is whether it is the predecessor’s ‘business’ which has been transferred and continued by the successor or, alternatively, there has merely been a transfer of assets or other incidental elements of the business. Unlike *The Successor Rights (Crown Transfers) Act*, *The Labour Relations Act* does not contain a statutory definition of ‘business’, and it is the Board, therefore, which must develop an appropriate meaning. In *Raymond Cote*, [1968] OLRB Rep. Mar. 1211 the Board commented:

‘The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is ‘the totality of the undertaking.’ The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.’

• • •

30. A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a *dynamic* activity, a ‘going concern’, something which is ‘carried on.’ A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a ‘business’ from an idle collection of assets.

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31. In determining whether a ‘business’ has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor’s business can be traced into the hands of the alleged successor; that is, whether there has been an apparent continuation of the business – albeit with a change in the nominal owner. The Board in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed) commented:

‘In each case the decisive question is whether or not there is a continuation of the business... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there

is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was [sic] before, i.e. whether there has been a continuation of the business.'

32. Of particular significance for a labour relations statute is the continuity of the work performed before and after the transfer, since the trade union is certified to represent certain work groups, the collective agreement regulates the conditions of work for employees in those groups, and the purpose of section 55 is to preserve both the bargaining relationship and the collective agreement. If the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, there is normally a strong inference that there has been a transfer of the business within the meaning of section 55. ..."

15. The interposition of a third party such as a receiver acting as an agent or conduit does not preclude the Board from finding that a sale of a business has occurred (see *Metropolitan Parking Inc.*, *supra*, at paragraph 28; and *Big Bear Storage*, [1979] OLRB Rep. Mar. 164), although an application under section 55 will be premature until such time as the business has been transferred from the predecessor employer through the receiver to a successor employer (see *Price-Waterhouse Limited*, [1979] OLRB Rep. Jan. 50).

16. The difficult task faced by the Board in applications such as the present case is that of the distinguishing between a transfer of a "business" (or "part of a business") and a transfer of "incidental" assets or items. As suggested by the Board in *Metropolitan Parking Inc.*, *supra*, at paragraph 34, previous cases are of limited value in resolving this issue since it is essentially a question of fact:

"This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a 'business' or a 'part of a business' and the transfer of 'incidental' assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided."

17. It was argued on behalf of Sisman's that it has acquired none of the goodwill of the predecessor employer through the transactions in question. The facts, however, do not support this contention. Following the consummation of the transaction with Coopers in Febru-

ary of 1980, Sisman's immediately registered the name "Hewetson of Canada" and manufactured casual shoes to be sold under that trade name which the evidence indicates has been synonymous with shoes for decades. The fact that Sisman's did not specifically purchase the goodwill of the business does not preclude a finding that it nevertheless acquired goodwill. As stated by the Board in *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691, at paragraph 12, "several . . . cases . . . indicate that the presence or absence of goodwill as an itemized factor of sale is not decisive and that the important consideration is whether the goodwill has in fact been transmitted. . .". Nor do we consider that the goodwill associated with this trade name was totally dissipated by the shut-down of approximately two months between October of 1979 and February 1980, as confirmed by the fact that Sisman's promptly registered the trade name and purchased advertisements in which the name was prominently displayed. Moreover, the existence of an interval between the time that the predecessor employer ceases operation and the alleged successor employer commences operation does not preclude a finding of successorship where the evidence establishes some form of continuity such as the continued existence of goodwill (see *Zehrs Markets Limited*, [1974] OLRB Rep. May 331). As stated by the Board in *Hughes Boat Works Incorporated*, [1977] OLRB Rep. Dec. 815 (application for judicial review dismissed, (1979), 26 O.R. (2d) 420 (Div. Ct.)), at paragraph 30, "what is referred to as a continuation of the business has reference not to a continuum in time, but in the nature of the business". Accordingly, the Board found the respondent in that case to be a successor employer even though the predecessor's business had been closed down for approximately five months.

18. In the present case, the business resumed operation at the "Hewetson Shoe Factory Building" in Brampton under the direction and control of Sisman's and, with machinery and other assets purchased from Mansfield through Coopers and a workforce consisting primarily of former Mansfield employees, manufactured for sale under the trade name "Hewetson of Canada" casual shoes similar to those which had previously been produced at that plant by Mansfield. While the respondent's motivation for resuming the operation in this fashion was to generate revenue to offset some of the overhead expenses while modifying the equipment and retraining the employees to produce cemented safety footwear, this motive does not change the fact that Sisman's continued to operate the same business as was carried on by Mansfield prior to the transactions in question.

19. Counsel for the respondent also argued that the Board should attach little or no importance to the employment by Sisman's of many of the former Mansfield employees. In support of this position he advanced the desirability of avoiding the adoption of an approach which might discourage purchasers from rehiring former employees to the detriment of such former employees. The Board has ruled in a number of cases that the employment by the alleged successor employer of former employees of the predecessor is a factor to be considered in an application under section 55. In *Metropolitan Parking Inc.*, *supra*, at paragraph 36, the Board noted that "continuity of the work and/or the employees is significant, but it is not always sufficient to sustain a finding of successorship". (See also paragraph 32 of that case as quoted earlier in this decision.) Refusal by a successor employer to employ such persons in an attempt to weaken the link between the successor employer and the predecessor employer in any subsequent successor rights application would constitute a violation of section 58 of the Act. However, in recognition of policy considerations similar to those advanced by counsel in the instant case, the Board has indicated that while the employment of such persons is one factor indicating the sale of a business, the refusal to employ such persons does not negate the fact of a sale (see *Zehrs Markets Limited*, *supra*, at paragraph 16). Accordingly, the Board finds that the fact that Sisman's chose to employ a substantial number of former Mansfield em-

ployees is a factor which suggests that a sale of the business may have occurred in the present case.

20. Counsel for the respondent submitted that the Board should not view the situation as of the date in February in which the transactions in question were completed. He argued by analogy to the Board's buildup principle in certification cases that the Board must consider the respondent's ultimate plans for the Brampton plant, namely, the manufacture of cemented safety footwear.

21. A change made by an alleged successor employer in the character of the business such that it is substantially different from the business of the alleged predecessor employer may have different consequences under section 55 depending upon when the change is made. If the change is made contemporaneously with or immediately after completion of the transaction which is alleged to constitute a sale of a business, it may result in a finding that no sale of a business has in fact occurred within the meaning of section 55. See, for example, *Dufferin Steel Company Awico Division*, [1976] OLRB Rep. Mar. 81, in which a change from production of ornamental iron and miscellaneous steel for a number of customers to production of plate for a single customer was found to support the contention of the alleged successor employer that there had been no sale of a business within the meaning of section 55 (in a situation in which the alleged successor did not purchase raw materials, inventories or receivables from the predecessor; refused \$700,000 worth of work on the books of the alleged predecessor; and did not employ persons in on-site erection and installation (i.e. the persons represented by the applicant trade union in that case) as the predecessor had done). However, to support such a finding, the change must be of a substantial nature, as indicated by the Board decisions in *Provincial Fruit Company (Ottawa) Limited*, [1975] OLRB Rep. Nov. 830 (in which the Board stated that a variation in the type of fruits and vegetables sold did not preclude a finding that there was a continuation of the business since both before and after the sale the employers were engaged in the sale by wholesale of fruit and vegetables); *Culverhouse Foods Limited*, *supra*, (in which the Board found successorship to have occurred despite an alteration in the type of vegetables canned); and *Hughes Boat Works Incorporated*, *supra*, (in which the nature of the business was held to continue to be that of construction and sale of boats notwithstanding that there had been some design changes). Thus, the result of a substantial change in the character of a business made contemporaneously with or immediately after completion of the transaction is that no successorship occurs; since no sale of a business transpires in such circumstances, section 55 is inapplicable and there is no preservation of existing bargaining rights or of the existing collective agreement (if any).

22. The Act contains a specific provision concerning the effect of a substantial change in character of a business made after a sale of the business has occurred. Section 55(5) provides:

"The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection 2 becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection 3, terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has

changed its character so that it is substantially different from the business of the predecessor employer.”

Thus, the result of a substantial change in the character of a business made after completion of the sale of the business but within the time frame specified in the subsection, is to empower the Board to terminate any bargaining rights which have attached to the successor employer's business by operation of section 55(2) or 55(3) of the Act. However, unlike the situation in which a contemporaneous or immediate substantial change of character precludes any successorship from occurring, a substantial change of character made subsequent to the sale of the business does not negate successorship; it merely gives the Board the discretion to terminate the bargaining rights which have flowed through to the successor employer as a result of the sale of the business, which bargaining rights continue to bind the successor employer unless and until the Board terminates them.

23. Since section 55(5) only applies where a sale of a business has occurred, it is implicit in that provision that the determination of whether or not such a sale has occurred is to be made by having regard to the manner in which the business was initially operated by the alleged successor employer prior to the making of a subsequent change to which section 55(5) may be applicable (such as the subsequent change from production of cemented casual footwear to production of cemented safety footwear in the present case). Applying this approach to the instant case, the Board on the basis of the totality of the evidence before it and having particular regard to the facts set forth in paragraphs 7, 8, 9, 10, and 18 of this decision, is satisfied that there has been a “sale” of the “business” of Mansfield through Cooper to Sisman's within the meaning of section 55 of the Act the Board so declares.

24. Having found that a sale of a business has occurred, the Board must also determine whether this is an appropriate case in which to exercise its discretion under section 55(5) to terminate the applicant's bargaining rights. The present case is a situation in which the change from production of cemented casual footwear to production of cemented safety footwear occurred during a period of several months after the transactions in question were completed. Thus, it is questionable whether this change occurred within the time frame specified in section 55(5). However, it is unnecessary for the Board to rule on that matter since the Board is of the opinion that the business has not in any event been so changed in character by Sisman's that it is substantially different from the business of the predecessor employer. The change from production of cemented casual footwear to production of cemented safety footwear is not a fundamental difference affecting the nature of the work requirements and skills involved in the business to such an extent that continued representation of the employees by the applicant trade union (which, notably, is a local of the “*Footwear Division*” of the Retail Clerks International Union) would be inadequate, inappropriate or unreasonable in all the circumstances of the case (see *Winco Steak n' Burger Restaurants Limited*, [1974] OLRB Rep. Nov. 788, at paragraph 24). Thus, having regard to all the evidence before it, the Board declines to exercise its discretion under section 55(5) to terminate the applicant's bargaining rights.

25. In view of our disposition of the section 55 application and in view of the fact that there is no evidence that Sisman's and Hewetson carry on associated or related activities or business under common control or direction, the application under section 1(4) is dismissed.

20-38-78-M Ontario Public Service Employees Union, Applicant, v. St. Clair College of Applied Arts & Technology, Respondent.

Employee – Application of criteria under *The Colleges Collective Bargaining Act, 1975* – Not falling within specific exclusions – Excluded by reason of duties and responsibilities – Board characterizing persons as part of management team

BEFORE: R. O. MacDowell, Vice Chairman and Board Members D. B. Archer and J. A. Ronson.

APPEARANCES: Joanne Miko for the applicant; Janice A. Baker and Lynne Watts for the respondent.

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN AND BOARD MEMBER J. A. RONSON; July 28, 1980

1. This is a reference under section 82 of *The Colleges Collective Bargaining Act* (hereinafter referred to as “The Act”). By a decision dated March 22, 1979 the Board appointed a Labour Relations Officer to meet with the parties and inquire into the duties and responsibilities of a number of named individuals. The issue before the Board is whether those individuals are employees within the meaning of The Act who are included in the “support staff” bargaining unit. The relevant provisions of The Act are as follows:

“82. If, in the course of bargaining for an agreement or during the period of operation of an agreement, a question arises as to whether a person is an employee, including a question as to whether a person employed as a chairman, department head, director, foreman or supervisor is employed in a managerial or confidential capacity pursuant to clause (1) of section 1 and the schedules, the question may be referred to the Ontario Labour Relations Board and its decision thereon is final and binding for all purposes.

1(f) ‘employee’ means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2;

Schedule 1

The academic staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology who are employed as teachers, counsellors or librarians but does not include,

- (i) chairmen,
- (ii) department heads,
- (iii) directors,

- (iv) persons above the rank of chairman, department head or director,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) teachers who teach for six hours or less per week,
- (vii) counsellors and librarians employed on a part-time basis,
- (viii) teachers, counsellors or librarians who are appointed for one or more sessions and who are employed for not more than twelve months in any twenty-four month period,
- (ix) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (x) a person engaged and employed outside Ontario.

Schedule 2

The support staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology employed in positions or classifications in the office, clerical, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff but does not include,

- (i) foremen,
- (ii) supervisors,
- (iii) persons above the rank of foreman or supervisor,
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) persons regularly employed for not more than twenty-four hours a week,
- (vii) students employed in a co-operative educational training program undertaken with a school, college or university,

- (viii) a graduate of a college of applied arts and technology during the period of twelve months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement,
- (ix) a person engaged for a project of a non-recurring kind,
- (x) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (xi) a person engaged and employed outside Ontario.

1(1) 'person employed in a managerial or confidential capacity' means a person who,

- (i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
- (ii) spends a significant portion of his time in the supervision of employees,
- (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
- (iv) is employed in a position confidential to any person described in subclause (i), (ii) or (iii),
- (v) is employed in a confidential capacity in matters relating to employee relations,
- (vi) is not otherwise described in subclauses (i) to (v) but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer;"

2. The purpose of the statutory exclusions is to ensure that persons in the bargaining unit are not faced with a conflict of interest as between their obligations as persons who may exercise managerial responsibilities, and their obligations and interests as members of the unit. Collective bargaining, by its very nature, requires an arm's length relationship between "the two sides", whose interests and objectives are often divergent. This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] Can LRBR 1 at page 3:

"In my view, the most important influence on that enquiry must be some

conception of the purpose of the statutory provision in issue. We are not asked to define what is meant by management in a vacuum. The legal effect of our decisions may be to exclude a person from the scope of collective bargaining. When we understand *why* the Legislature may have wanted to omit such a general category of individuals from the ambit of its statutory policy, we will be much better able to see exactly *what* positions should be excluded.

The explanation for this management exception is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management – on the one hand an employee equally dependent on the enterprise for his livelihood but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g. individuals who may be disciplined for 'cause' or passed over for promotion on the grounds of their 'ability'. The employer does not want management's identification with its interests diluted by participation in the activities of the employees' union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could be drawn from

the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of the employees, the law has directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it."

3. The structure of a Community College differs from that of a private business, and some care must be taken before utilizing concepts developed in a private sector industrial setting, and superimposing them on a public sector educational institution. No doubt, it was an appreciation of these differences which prompted the Legislature to enact a specialized statute which spells out, in much more detail than in *The Labour Relations Act*, precisely those functions which, if exercised, should exclude an individual from the ambit of collective bargaining. It must be recognized however, that section 1(1) and Schedule 2 are framed in very general language. The application of these provisions to any particular situation is bound to raise interpretative difficulties. There will always be a grey area between those who are clearly included in the bargaining unit, and those who are excluded from it, and the degree and focus of managerial authority will change from employer to employer, and from time to time. The Board must consider the evidence in each case, and apply the legislation in light of the purpose of the statutory exclusions.

4. The Labour Relations Officer examined, and transcribed the evidence of nine individuals. The respondent submitted various statutory bases for excluding all of them. It will be convenient to deal separately with the evidence and argument respecting Lilly Spolarich, Elaine Labbee and Anne Bennett; and to treat the divisional directors of Continuing Education and their assistants as a group. An individual will be excluded if any one of the enumerated provisions in the schedule or statute applies to him.

5. *Lilly Spolarich*

Ms. Spolarich is executive secretary to William Geradtf, Director of Plant and Services. As his private secretary she has her own office, and reports only to him. Her duties are exclusively secretarial. She has no managerial or supervisory authority over other employees, nor has she any involvement in the collective bargaining, or internal disciplinary process. She apparently has access to the employee evaluations, (copies of which are forwarded to Mr. Geradtf from his subordinates), however there is no evidence that any use is made of such material, and it would appear that, in any event, the subject employee also gets a copy. Ms. Spolarich is aware of, and types, reports concerning bomb threats, fire hazards, and internal investigations with respect to theft or other security problems; but these are only peripherally related to employee relations – as, for example, when a faculty member received a letter of reprimand because of his alleged misconduct arising out of one of these incidents. Ms. Spolarich did not give any details concerning this matter, but it would appear that the disciplinary penalty was relatively minor, and, while she was aware of the event giving rise to the discipline, and of the imposition of discipline, she was not involved in any way in the disciplinary process itself.

6. Ms. Spolarich's input with respect to the Plant and Services budget is negligible. (It might be noted that this is not a budget of a "college" or a "constituent campus of a college" except to the extent that all branch or department budgets can be so described.) Ms. Spolarich's involvement encompasses only typing, checking and some manual calculation using

information supplied to her by her superior. Although she testified that the budget would contain a figure for projected wage increases she subsequently emphasized that the budget refers to actual salaries. Even if there is a wage figure in the budget, it may be based upon the steps in an already negotiated collective agreement, or reflects an inflation factor or is simply a "guesstimate". There is no evidence of any connection with the collective bargaining process and, in this important matter, the Board is not disposed to speculate.

7. We are satisfied that the only possible basis for excluding Ms. Spolarich is that found in section 1(1)(iv) of The Act (see *supra*). On this branch of the argument Ms. Spolarich's status turns on the duties and responsibilities of Mr. Geradtf, her superior.

8. Mr. Geradtf reports directly to the president, and is one of the six senior executives of the College. He prepares and administers a budget of some two million dollars, has five departmental managers reporting to him and oversees the activities of a department of the College employing between fifty and sixty employees. He attends meetings of the Board of Governors, and sits on the Board's Property and Finance committees. He receives copies of the minutes of all full-Board meetings and executive committee meetings. He knows, in advance, important information concerning alternatives of College policy including increases or decreases in full-time staff complement, and terminations resulting from proposed budget cuts. Ms. Spolarich testified that Mr. Geradtf freely discusses with her, the happenings at the various meetings which he attends; and, of course, notes, reports, memoranda, or other materials, which have to be prepared in respect of those meetings, are typed by her.

9. The position of a private secretary, and the application of the statute to persons so described, was discussed by this Board in *St. Lawrence College of Applied Arts and Technology*, unreported, Board File No. 1657-77-M decision dated July 11, 1978, as follows:

"The Board stated in the *Sheridan College* case, *supra*, that the 'confidence' referred to in section 1(iv) of the Act relates not so much to the material dealt with by the person in question as to the nature of the relationship between the person and the employer. The Board went on to state in that case that a person who acted as an intimate policy sounding board to his or her superior and had substantial input into and influence on decisions of the employer relating to program policies, budgets or the disposition of grievances would be manifestly within the group of employees described in the subclause. The Board is of the view that a person who serves as a private secretary to a person who falls within part (i), (ii) or (iii) of the definition would also come within part (iv) of the definition. The Board has reached this conclusion on the basis of both the nature of the relationship and the material to which the private secretary has access. A private secretary is one who takes dictation, performs typing and transcribing services, maintains records, records minutes of meetings, prepares reports and performs related secretarial services on an exclusive basis. The relationship between the person coming within subclause (i), (ii) or (iii) of the definition and the person who performs this range of secretarial services on an exclusive basis is one which is based upon an individual and undivided loyalty. The person filling the position has, as a part of her regular job function, a day to day exposure to the correspondence of her superior, both incoming and outgoing, and

to all other information which must be transcribed or recorded. She is privy in a material and necessary way to much of the information to which her superior is privy and accordingly, it must be found that she is employed in a position confidential to her superior. In the result the Board reads part (iv) of the definition as extending to persons who serve as private secretaries to persons falling within parts (i), (ii) or (iii) of the definition."

10. The evidence respecting Mr. Geradt's duties and responsibilities was neither contradicted, nor qualified in the cross-examination. In the circumstances the Board must infer that Mr. Geradt is a person exercising the senior executive responsibilities contemplated by section 1(1)(i) of the Act. Accordingly, having regard to the reasoning of the Board in *St. Lawrence College, supra*, we must find that Ms. Spolarich is an individual to whom section 1(1)(iv) of the Act applies and that she must, therefore, be excluded from the bargaining unit.

11. *Anne Bennett*

Ms. Bennett has occupied the position of "office manager" since January of 1979. Prior to that she was secretary to Lorne Clark, the Dean of Continuing Education. She works directly with J. Charlesworth, the Acting Director of Continuing Education and has a "liaison role" between Charlesworth, Clark and R. F. Giroux, Vice-President and Dean of Community and Industrial Services. The five divisional directors rotate, each occupying the position of acting director for a period of three months.

12. It might be noted that exhibit #3, the portion of the respondent's organization chart filed with the Board to clarify Ms. Bennett's position, is somewhat misleading. The chart suggests Ms. Bennett reports to R. F. Giroux, Vice-President and Dean of Community and Industrial Services; but her *viva voce* evidence is that she works directly with Charlesworth. This illustrates the general difficulty faced by the Board in using position titles, job descriptions or organizational charts. Written specifications and charts are necessary to facilitate administration, and may have some illustrative value, but there will often be times when the theoretical scheme does not fully coincide with the duties and responsibilities actually performed by those involved. The Board is concerned with a person's actual duties and responsibilities, rather than what is stated in a position specification or suggested by an organization chart; and, such charts are of limited usefulness unless they illustrate substantially more than the fragment of the respondent's organization in which the disputed position falls. Charts are only helpful if they clearly and accurately illustrate the entire "chain of command", including the number and positions of individuals included and excluded from the bargaining unit. The organization chart, and certain passing references in the *viva voce* evidence, suggest that Giroux and Clarke both occupy managerial positions, so that there are two layers of managerial authority directly above the Divisional Directors; yet evidence concerning the full range of their responsibilities is lacking. Neither gave evidence and none of the questions were specifically directed to this issue. While there is no fixed ratio of superiors to subordinates or specified proportion of the work force which must be included or excluded, the number, and functions, of individuals already excluded are clearly a relevant factor. The purpose of the statute is to extend collective bargaining rights to Community College employees. It would frustrate that purpose if, on a piecemeal basis, and in an effort to safeguard the employer's collective bargaining interests, this Board interpreted the statutory exclusions in such a way as to seriously erode the bargaining unit and undermine the employees'

bargaining rights. If the Board is to reach a sensible result which is sensitive to these important concerns, it must have a clear evidentiary foundation on which to base its decision.

13. Ms. Bennett performs what she described as a "staff function" within the Continuing Education division. This includes a variety of administrative and clerical duties respecting advertising, the preparation of calendars, room scheduling, preparing reports for government agencies such as Canada Manpower, taking minutes of Continuing Education meetings, and keeping a variety of records respecting budgeting, staff reports, invoices, time-tabling part-time teachers and other matters. She has no precise knowledge of, or significant input into, the preparation of Continuing Education Budget. In any case, the evidence does not demonstrate that this budget contains any information, which, if disclosed, would prejudice the respondent's bargaining position. Ms. Bennett has no independent authority respecting the establishment of fees, the conduct of courses, the hiring of teaching staff or any of the other principal educational responsibilities undertaken by the department of Continuing Education. She does attend meetings of the Divisional Directors at which these matters are discussed, and she keeps the minutes of those meetings. She does not have a policy making role at the level contemplated by section 1(1)(i), nor are we satisfied that she is employed in a position confidential to any such person.

14. Two "full-time" clerks assist Ms. Bennett in performing her administrative functions and she has a limited supervisory role with respect to these individuals. Ms. Bennett testified that she had "hired" them, but on further examination she indicated that she merely participated on the hiring committee, and that one individual seems to have acquired "full-time status" almost by accident. One of the clerks was hired two years ago and the other one year ago. Both events occurred while she was still secretary to Dean Clarke, and before she assumed her present position. There does not seem to be any continuous supervision of the full-time clerks' activities of the kind which would raise a conflict if she were included in the unit, nor is there a significant training role. She has never reprimanded or disciplined them, and has never recommended improvement or a wage increase – even though this appears to be part of the standard evaluation form which was filed as an exhibit. It might be observed that the actual use of these forms is uncertain. All of the witnesses regard them as a pro forma exercise which is carried out sporadically and does not, on the evidence, have any connection with any consequences to the employee, either beneficial or adverse. Ms. Bennett testified that anything as serious as a discharge would be referred to the Personnel Department. In determining the significance to be assigned to these indicia of managerial authority we think the views of Professor Weiler in *City of Burnaby*, *supra*, are apposite:

"Clearly, the authority to hire, fire, discipline or promote is central to what we mean by 'exercising management functions over other employees'. Yet the complexity of a Board's evaluation of any position is conveyed by this very example. The decisions to discharge or promote an employee are those where there is the highest potential for a conflict of loyalties from membership in the bargaining unit. The decisions to hire, or even to discipline (especially by way of reprimand) are much less significant in that regard. Yet from the evidence here, the importance of the actual exercise of that authority to discharge is much less than that of hiring, simply because discharges are so infrequent. The use of the power to discipline or to promote is somewhere in between."

In the present case there is little evidence of any authority to make decisions of a “managerial” character which affect the economic lives of fellow employees.

15. Ms. Bennett is assisted by and supervises five or six part-time staff who are selected from a pre-established pool prepared by the Personnel department. It would seem that by virtue of section 1(f) of the Act and Schedule 2(vi), these individuals would not be employees in the bargaining unit. Ms. Bennett’s initial evidence suggested that she had total flexibility with respect to “hiring” persons from this pool in accordance with the workload. Later in her evidence however she clarified the matter. There are presently five individuals who are used on a regular basis in accordance with an arrangement established before Ms. Bennett came to the department. Consequently, her role is restricted to determining whether the workload requires more staff, and she has little discretion with respect to selection. Ms. Bennett has no input into collective bargaining, and no involvement with or clear understanding of the grievance procedure – even though the collective agreement appears to envisage that the “immediate supervisor” is the first step for certain kinds of grievances. She has certain limited authority, and supervisory responsibilities with respect to the two bargaining unit employees (for example she can grant limited casual time off and can determine the necessity of overtime work), and she undoubtedly performs an important co-ordinating and administrative role within the Department of Continuing Education (see paragraph 13, *supra*); however we are satisfied on the totality of the evidence that she does not spend a significant proportion of her time in the supervision of bargaining unit employees, nor do any of the other statutory exclusions apply to her. We are satisfied that she falls within the office staff portion of the support staff bargaining unit. On the evidence sections 1(1)(i) – (v) have no application and we decline to exercise our discretion under 1(1)(vi).

16. *Elaine Labbee*

The principle submission of the respondent is that Ms. Labbee is employed in a confidential capacity in matters related to employee relations, or is privy to confidential information which, if disclosed, would prejudice the respondent’s collective bargaining position. In *Sheridan College of Applied Arts and Technology*, [1976] OLRB Rep. Dec. 844, this Board held that the term “employee relations” was synonymous with “industrial relations” or “labour relations”, and includes “all facets of the collective bargaining relationship that regulate the terms and conditions of employment between an employer and his employees represented by a trade union.” The statutory language of *The Colleges Collective Bargaining Act* is identical to that of *The Labour Relations Act*, and the Board has adopted a similar approach to its interpretation. (See: *Sheridan College*, *supra*, *St. Lawrence College*, *supra*; and *Humber College of Applied Arts and Technology*, unreported decision dated July 11, 1977. In *York University*, [1975] OLRB Rep. Dec. 945, the Board framed the test this way:

“... the Board must be satisfied of “a regular, material involvement in matters relating to labour relations” to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd.* case, [1969] OLRB Rep. September 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case, [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed “confidential” in the sense that the employer would not approve of the disclosure of such

information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case, [1974] OLRB Rep. May 291. The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise. (See, *The Toledo Scale Division of Reliance Electric Limited* case, [1974] OLRB Rep. June 406).

17. The handling of collective bargaining information must be at the core of the disputed individual's job functions. An occasional or peripheral involvement is insufficient to justify his exclusion. As the Board observed in *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379:

"A person to be excluded under this provision must be employed "in a confidential capacity", i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can be readily be seen, the degree of the involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions."

The application of this "test" to the facts in *Frito-Lay Canada Ltd.*, [1978] OLRB Rep. Sept. 831 prompted the Board to reach the following conclusion:

"While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent's industrial relations strategy, and the Board must conclude that these employees are not employed in a confidential capacity in matters relating to labour relations."

18. The decision of the Canada Labour Relations Board in *Transair Ltd.*, 74 CLLC 905 elaborates at some length upon the kind of information which, if disclosed would be prejudicial to the employer's collective bargaining interests. Although some allowance must be made for the different statutory and business context in which that decision was made, we are satisfied that the Canada Board's description provides a useful summary of the kind of collective bargaining information which, *mutatis mutandis* must be regarded as "sensitive" in the present case. At pages 911-912 the Board sets out a number of relevant considerations:

"(b) '... in matters relating to industrial relations' means having access to information relating to such matters as contract negotiations; for example, the persons that sit together to establish, on behalf of manage-

ment, the range of salary increase that the bargaining team will be mandated to operate within at forthcoming negotiations; or to such matters as the proceedings before a Board like this one: for example, the persons that sit together and plan the strategy which the employer will use as well as the tactics used in the pursuance of its legitimate interest before a Labour Board; or to such matters as the disposition of grievances: for example the persons who plan or who know what compromise will be offered to a grievor.

(c) The access to this information must not be incidental or accidental. It must be part of an employee's regular duties. If the main function of the employee is not related to matters relating to industrial relations, that employee cannot be excluded.

Therein lies a serious matter of judgment and fairness on the part of employers. If management chooses to openly hold discussions in matters related to industrial relations where they could be easily overheard or if management keeps documents of the same nature, in a place where an unauthorized person may inspect them at will, this is no cause for excluding these persons. As an example, if management decides to give keys to files in the personnel department containing data on forthcoming negotiations to all of its clerical employees, this would not make all of them confidential employees in matters relating to industrial relations.

(d) Disclosure of the information to which these persons have access must have an adverse effect on the interests of the employer. The interests of the employer concerned here however, must be interests in industrial relations. In other words, the disclosure of a written reprimand deposited in the personal record of an employee by somebody in a clerical function to union representatives does not have an adverse effect on the interests of said employer where the collective agreement stipulates that concomitant with such deposit in the file, a copy must be forwarded to the employee concerned and/or to the union. On the other hand, disclosure by an employee of information he has access to concerning secret manufacturing process to competitors might well be a breach of confidence and loyalty on the part of that employee but has nothing to do with industrial relations.

(e) On the other hand, one must attach great importance to the absolute necessity for an employer to be capable of operating efficiently and therefore to have the essential number of employees administering industrial relations to assure efficient management in this connection. Employees who are solicited for and accept functions with a company which make them an essential part of that autonomous team which has to administer labour relations, must realize that they will be by the same token deprived from ever aspiring to the acquisition of bargaining rights."

19. The difficulty in the present case is not in establishing the appropriate indicia,

which, if present would establish that an individual should be excluded from the bargaining unit. The problem in the present case is to unravel the testimony so as to determine whether Ms. Labbee's work situation and job functions bring her within the above-mentioned parameters. In this regard one must be careful lest the sophistication of the computer technology and information handling techniques, mask the essentially clerical character of an employee's duties. It is not the method by which information is collected or collated which is significant; it is the use which the disputed individual makes of that information, and the potential for prejudice to the employer's collective bargaining interests if an employee with such information were a member of the bargaining unit.

20. Ms. Labbee is a general clerk employed in the Personnel department and reporting, along with three other employees, to John Payne, Director of Personnel. Ms. Labbee "codes" personnel information that is subsequently processed by key-punch operators (members of the bargaining unit) and, it would seem, subsequently entered into the computer by an "input-output clerk" (also in the bargaining unit). The computer system maintains a record on all of the employees including basic information about educational background, salary, classification, job title, position in the wage progression, and the review date. Mere access to this information is not sufficient to raise the kind of conflict contemplated by the statute. In this regard the Board in *St. Lawrence College, supra*, remarked (at paragraph 6):

"These personnel records include employment application letter/form, evaluation reports, salary information, medical reports and other normal personnel information including the individual's marital status. This information may be considered as confidential in the sense that an employee with access to it is not expected to divulge it. It cannot, however, be described as information which, if divulged, would adversely affect the employee relations interests of the employer. An employee who has regular access to this type of information would not be thrust into a conflict of interest if included within a bargaining unit of other employees..."

The individual employee would, of course, already have this information; and it would seem (although the evidence is not entirely clear in this regard) that everything other than workload data (to which we will refer *infra*) is provided to the union on request.

21. Ms. Labbee testified that she is involved in the preparation of a number of reports of various kinds which are sent to the Board of Governors, College departments and outside governmental bodies. These reports to the Board of Governors include aggregate data broken down as requested on such things as hiring, terminations and the reasons therefore, transfers, full-time/part-time staffing ratios, etc. Ms. Labbee testified that the Board of Governors used this raw data as the basis for its planning projections and assessing manpower needs; although Ms. Labbee herself has no participation in this process. Her function is restricted to an involvement in preparing information which is assessed and acted upon by others. She also ensures that general College information is transmitted to the Ministry of Colleges and Universities information system and prepares the regular report on teaching staff "contact hours" - a three-month rolling average of teaching hours, which is calculated and regulated in accordance with the formula in the collective agreement. This latter information is transmitted to all department chairmen and deans. In addition, Ms. Labbee maintains records of certain budgets, (for example for supplies and advertising expenditures) and keeps a record of administrative staff including information similar to that referred to that above and their "hay

points” – the points assigned to them which note their level of responsibility and which can be used to calculate salaries. The evidence does not clearly disclose any input into the actual determination of salaries. It would appear that her involvement with administrative salaries is restricted to mechanical calculations based upon the evaluation of others and predetermined salary increments. The evidence does not elaborate upon the method of determining these administrative salaries, or connect this process to either the wages of bargaining unit personnel, or to the collective bargaining process. In the absence of clear evidence with respect to these matters, the Board is not disposed to speculate on the *potential* conflicts of interest which *might* arise if the bargaining unit personnel were aware of such matters. Moreover, as has already been pointed out, it would appear that certain bargaining unit personnel working with the computer already have such information.

22. Ms. Labbee has no input directly or indirectly into the collective bargaining process. That process is highly centralized and conducted on a province-wide basis. The evidence does not reveal any clear connection between the issues at the bargaining table and the reports which Ms. Labbee prepares. Any suggestion we might make with respect to this matter would be entirely speculative. We do not think the mere preparation of information to be used by others is sufficient to justify an employee's exclusion unless the material is to be used for bargaining purposes and its preparation would necessarily reveal an employer's bargaining objectives, possible areas of concession, or other strategically useful information prior to the actual bargaining taking place. Such insider information is obviously of an extremely sensitive nature and the possession of it would be sufficient to ground an exclusion. It must again be emphasized however, that the issue is an evidentiary one, and there must be a clear factual basis to establish the alleged connection between the preparation of information, and what takes place at the bargaining table.

23. Similar comments can be made with respect to the administration of the collective agreement and the handling of grievances. If an employee is closely involved with his superior in formulating the respondent's answer to a particular grievance the position of the respondent could be prejudiced if that individual were included in the bargaining unit. If, however the employee does not exercise any independent judgment but merely compiles or collates information contained on a written record, there may be no “insider information problem”. The “sick leave grievance” to which Ms. Labbee referred provides a case in point. Apparently, a dispute arose concerning the interpretation of whether “sick days” were “contact days” within the meaning of the collective agreement. On her superior's request, Ms. Labbee compiled some statistics on these matters. When asked whether the information that she provided was key to the process of reviewing the grievance and establishing the College's “defense” Ms. Labbee testified that she didn't know. She wasn't directly involved. It is apparent, at least on the evidence before us, that Ms. Labbee is not intimately involved in the grievance process, and since there seem to have been very few grievances in any event, that aspect of her job is incidental and peripheral to her main duties and responsibilities.

24. One aspect of Ms. Labbee's testimony caused the Board considerable difficulty. In answer to a question by the applicant concerning her participation (if any) in the costing of proposed salary or benefit items prior to negotiations, she replied that she had no input into such matters but did know what the percentage was before it was fully settled. This is critically sensitive information as the Board noted in an earlier case involving the parties herein (see: Board File: 1612-78-M released Nov. 20, 1979). That case involved an individual in the budget department who had advance knowledge of projected terminations for budgetary reasons and

knowledge of the percentage increase being budgeted for future wage increases. In characterizing this as the kind of sensitive “insider financial knowledge” which would justify an individual’s exclusion, the Board cited with approval the following excerpt from “the Dean case” – a decision of the Ontario Public Service Labour Relations Tribunal which held:

“There are also people who, in assessing the Government’s budget or an agency’s budget, are concerned with the amount of money that may be required to meet the payroll commitments as well as projected commitments that could arise through the collective bargaining process. To the extent that these people may possess information that may place them in a potential conflict of interest they should not be members of the bargaining unit. Such people if possessed of confidential information as to the Government’s intentions in dealing with its own employees should not be placed in the bargaining unit where potentially they could use their “insider’s” financial knowledge in bargaining with the Government. Persons with that type of knowledge will generally be excluded under the provisions of section 1(1)(m)(vii) [of The Crown Employees Bargaining Act] because they are employed in a confidential capacity in matters relating to labour relations.”

25. The problem in the present case is that the evidence with respect to this important matter is most unclear. Unlike the budget clerk in the earlier case, Ms. Labbee is not involved in the College’s budgeting process. In response to a further question from the applicant, Ms. Labbee testified that this wage information was not knowledge which was used in her job, was unnecessary for her to know, and apparently was revealed on a casual basis by her superior. If she were included in the unit, access to this information could be prevented or withdrawn. On the basis of the evidence before us therefore, it would appear that this information is irrelevant to Ms. Labbee’s ordinary duties and responsibilities and should not be given significant weight – especially when she clearly has no input into the bargaining process itself and there is no evidence that even her superior participates directly in the (province wide) bargaining. Had a clear collective bargaining connection been established, or had the evidence clearly demonstrated Ms. Labbee’s necessary access to critically sensitive collective bargaining information, the Board would have had no hesitation in excluding her from the bargaining unit as was done in the earlier case respecting the budget clerk.

26. Finally we adopt the approach taken by the Ontario Public Service Labour Relations Tribunal in the “Dean Case” when the tribunal was called upon to interpret the term “formulation of budgets” which appears in a statutory exclusion framed in precisely the same language as the one here under consideration. At page 8 the Board commented:

“Within the Government there are numerous people involved in the collecting and collating of data and information related to the receiving and expending of government funds. Thus in any department or agency there may be a person who exercises a stores function, in that, such a person maintains an inventory of the supplies used by the particular department or agency and costs that information which is used at a later stage. There may also be people who collate data related to expenditures or financial assistance rendered to specific property or programs. Often these people will be asked to make assessments based on certain historical patterns

and projections but that does not mean that they are involved in the formulation of budgets. Again in that area we distinguish between being "involved. . . in the formulation of budgets" and mere involvement which simply entails supplying financial data and information or collating that data and information for subsequent use. Persons involved in the formulation of budgets are those who after receiving all the information, suggestions, projections and reports systematically reduce that information into an express budget. Those are the people that we consider to be managerial. They are the people, who in the final analysis, make the decisions as to how the government or its agencies will conduct their financial affairs and what priorities will be considered in determining both how government revenue will be raised and how government funds will be spent."

It is clear that Ms. Labbee is not involved in the budgetary process in the manner contemplated by Schedule 2 Item (iv) or section 1(1)(i), nor are we satisfied that such involvement which she may have with information related to the budget, is such as to bring her within the confidential exclusions. Since there is no evidence respecting the actual duties and responsibilities of her immediate superior, we are unable to find that she falls within the scope of Section 1(1)(iv) as did Ms. Spolarich.

27. In the result, on the basis of the evidence before us (and noting that some significant portions thereof were vague and confusing) we are not satisfied that Ms. Labbee should be excluded from the bargaining unit.

28. *The Divisional Directors*

The five divisional directors (and their assistants) are the principal administrators of the respondent's continuing education programme. The College has a full-time equivalent enrollment of approximately 5,000 students. The enrollment in the School of Continuing Education is approximately 20,000 to 25,000; however, this figure may over-emphasize the importance of the school since many of these students may be taking courses on a piecemeal basis and may not be pursuing any formal academic programme. Many of the courses are a form of job training designed to upgrade the students' job skills, and are 'sold' on that basis. Some will be geared to apprenticeship or retraining programmes carried out in conjunction with various government or trade groups; others will be part of a cluster of courses leading to a certificate. The courses may, or may not bear any close relationship to those given in the College's regular programme (day school). The subject matter of full-time equivalent courses is subject to the control of the Dean of the appropriate day school department; otherwise the course content is tailored to the needs of the customer. The proportion of full-time equivalent courses and the utilization of full-time day school teachers ("moonlighting" on a contract basis) varies from division to division. There is no direct evidence concerning the proportion of college funds devoted to the School of Continuing Education, nor can it be determined whether the programmes generate revenue or operate closer to the break-even point. The College, in common with other post-secondary institutions, faces a potential decline in enrollment of full-time students. Continuing Education is continuing to grow at approximately 15% per year. This, in itself, is significant, and, since the programme involves direct contact with the community at large, its successful operation enhances the College's image.

29. The position description for Tom Callaghan, Divisional Director – Community Services, was prepared in April, 1978, and accurately sets out the general role of a Divisional Director in the School of Continuing Education. This description was verified, (and varied to some extent) by *viva voce* evidence from each of the Divisional Directors, and provides a useful starting point for an examination of their duties and responsibilities. The relevant portion of Callaghan's position description is as follows:

“General Accountability

Reporting to the Dean of Continuing Education the Divisional Director – Community Services is accountable for the identifying, developing, planning, marketing and administration of the educational needs of the part-time student in the areas of Applied Arts, Social Services and Applied Health that are required by business, industry, public services and the adult community in general. The Divisional Director is held accountable for the operating budget, equipment inventory, off-campus facilities and fee income generation within the area of responsibility.

The School of Continuing Education is responsible for the academic standards of all Continuing Education courses and programs in Kent County as well as being responsible for part-time studies, standards and operations at the College in Windsor and Essex County with 182 programs and approximately 2,000 courses. In addition there are many special courses, seminars, workshops and conference development to meet the needs of the community. Approximately 10% of the curriculum taught in the Community Services Division is full-time equivalent and the academic standards for this curriculum is the responsibility of the Deans of Applied Arts and Business, Allied Health and Technology, Technical Arts and Trades and Retraining as appropriate. The remaining 90% are Continuing Education courses and programs designed to meet other needs of the part-time students serviced by this division.

The majority of courses offered in Continuing Education are scheduled in the evening in order to accommodate the community, and as such, requires the incumbent to be available during these periods as well as being available throughout the day to ensure the effectiveness of the educational process.

The Divisional Director is required to develop and implement a successful student recruitment campaign in consultation with the Dean of Continuing Education and is also required to provide an effective academic counselling program for individual students in order to ensure that the students are receiving maximum educational benefits from the programs and courses.

The incumbent is required to establish effective communication lines with business, industry, service organizations, union, government agencies, professional associations, other educational institutions and orga-

nizations, together with members of the community to uncover and satisfy educational requirements.

The incumbent is responsible for the development, motivation, evaluation and discipline of teaching staff he hires within established guidelines (i.e. Union Contract and Approved Pay Scale). All exceptions to these guidelines must be approved by his immediate supervisor.

The incumbent is free to act independently in the areas of course/program selection, curriculum and financial expenditures within authorized budget limits.

The Divisional Director – Community Services may be required to act on behalf of the Dean in his absence.

The incumbent is responsible for T.V., radio and correspondence course co-ordination for the school and development for the Community Services Division as well as being charged with the responsibility of the planning and carrying out of public relations and special activities related to the School of Continuing Education and the Community Services Division in consultation with the Dean.

The incumbent is responsible for the continual acquisition, maintenance and management of the Community Services equipment and inventory.

The position is one of six reporting to the Dean of Continuing Education. The other five are:

- (1) Divisional Director – Business and Commerce
- (2) Divisional Director – Technical
- (3) Divisional Director – Essex County Area Programs
- (4) Divisional Director – M.D.P./T.I.B.I./C.M.I.T.P.
- (5) Executive Secretary

Reporting directly to the Divisional Director – Community Services are the following categories:

- (1) Assistant Divisional Director
- (2) Secretary I
- (3) Part-time administrators – persons responsible for curriculum planning, implementation, marketing of quality education, recruiting and supervising faculty, students, support staff and course activities in the areas of responsibility.
- (4) Numerous part-time faculty recruited from:– the full-time St. Clair College Staff (5% to 15%) and expertise from the community (85% to 95%).

The Divisional Director – Community Services is responsible for 60 cer-

tificate programs in the Applied Arts, Applied Health and Social Services areas. The incumbent introduces and maintains, through a principal subordinate, the management of the Applied Health and Social Services programs which are 27 in number. The Applied Arts programs, totalling 33, are managed directly by the incumbent. The incumbent, through liaison with individual groups and sectors in the community, is responsible for responding to, and the articulation of the expressed and unexpressed needs of the community."

30. Callaghan's evidence was fairly typical of that of all five Divisional Directors. His primary responsibility is to assess the need for courses in the community and develop course "packages" to satisfy these needs. This was described as a marketing or "sales" function, which, in turn, involves the recruiting of numbers of part-time teachers (some of whom, as we have noted, would be full-time faculty of the respondent "moonlighting" on a contract basis), providing classroom space, and doing the necessary scheduling. Callaghan testified that he arranges for some 500 courses per year, and hires individuals to teach those courses. These persons are hired solely on a part-time basis, and are not included in the bargaining unit. Many of the courses are conducted off campus so that teaching space has to be rented or arranged with the client. Some of the directors have special off campus facilities which are owned by the College and used for community education purposes. Callaghan has hiring, firing, and "disciplinary authority over all of these part-time instructors, although, in practice, formal discipline has been unnecessary, since teachers are hired on a temporary basis and problems can be resolved by simply declining to rehire them.

31. Part-time instructors work pursuant to a standard form contract which was developed some time ago by L. C. Clarke, the Dean of Continuing Education. (The position of "Dean" has recently been eliminated; but Ms. Bennett testified that Clarke continues to work directly with Dr. Giroux "on budget and overall community and industrial services policies"). Wages are paid on an hourly basis in accordance with an established range of approximately \$12 - \$17 per hour. Each Divisional Director has some authority to vary an individual instructor's salary within the prescribed range. Similarly, there is a general, prescribed student fee of \$35 per course, which can be varied in exceptional circumstances. Courses must be approved by the College, and can be cancelled in accordance with College guidelines. Full-time equivalent courses must comply with established College academic standards. Under the previous administrative structure, L. C. Clarke had to approve new courses. The evidence does not disclose whose formal approval is now required, but it is clear that the Divisional Directors have the direct responsibility for initiating courses, and it would appear that so long as they can be "sold" approval is virtually automatic. In practice, it is also the Divisional Directors who decide to cancel courses - presumably when they can no longer be "sold".

32. Each Divisional Director prepares a budget for his section of the Continuing Education Department. Callaghan testified that the budget proposal from each Divisional Director is submitted to an individual who he described as "sort of a business director. . . in the department who is responsible for pulling together the budget for the community and industrial services areas." There was no direct evidence on the identity or responsibilities of this individual. There was also evidence of a budget committee for the Department. Copies of each Divisional Director's budget proposal are given to, and reviewed by, R. F. Giroux, (to whom each Director reports), who is responsible for the overall community and industrial services budget. We are satisfied that it is Giroux who has ultimate authority with respect to

the school budget and each of its divisional components but if the Directors have done their job adequately their proposal may be accepted without question. Following Giroux's approval, the continuing education budget is submitted to, and must be approved by, higher levels in the College hierarchy. Bennett testified that it was Clarke who did the actual "negotiation" with the respondent's budget office, however, it would seem that Giroux is now involved in this process. Half way through the academic year, the Directors render an accounting, review the items previously determined, and recommend changes. There is also a report at the end of the year to assess the accuracy of the budget, and the Director's budget performance. There is seldom any questioning of specific items in the budget proposal, although the budget proposal may be reduced, or varied in accordance with general College guidelines, or restraints. The Divisional Directors can, and do, exceed their budgets, but they must be prepared to justify such overspending to Giroux. Exceeding the budget was regarded as a "grey area". Some of the Directors felt they could do so as long as it could subsequently be justified to Giroux; others felt that it was their responsibility to advise Giroux in advance.

33. The approval of the school budget by higher authority in the College establishes the financial framework within which the School of Continuing Education and each Divisional Director must operate, unless his component of the budget is altered in the half-yearly review. Each Director spends substantial sums of money, but equipment purchases over \$500 are channelled through the College's purchasing department, and any expenditure over \$500 must be authorized by Giroux. Callaghan testified that there may be more flexibility with respect to expenditures out of what he described as "cost recovery funds", but the other five witnesses all emphasized that there was a \$500 spending limit which could not be exceeded without Giroux's approval.

34. Callaghan described the marketing of courses as a "sales operation" which the school sought to run on a self-financing or "cost recovery" basis. He explained that the per capita student fee generates considerable revenue from which one must deduct, as a cost: the fees paid to instructors, rental payments (if any) for off-campus space, and administrative expenses. The fees are set to cover the cost of materials and administrative expenses. If a particular course or programme requires an unusually large expenditure, the prescribed \$35 fee can be adjusted upwards to cover the exceptional costs. The kinds of supplies purchased varies with the course—flowers for floral courses, pottery clay for ceramics, materials for furniture refinishing etc. The cost recovery funds make up at least two-thirds of Callaghan's total budget of approximately \$400,000. The rest of the budget involves a direct commitment of College funds for such things as "overhead", full-time secretarial or support salaries (and presumably the salaries of the Divisional Directors themselves). It is interesting to note that the Divisional Director has no authority to hire any full-time employee, or otherwise increase the full-time staff complement. Such request must be directed to Giroux, and the evidence suggests that even he has no final authority in this regard. Ultimate approval rests with senior college officials outside that School of Continuing Education. If money is required for any special project or expenditure not included in the budget, a request for such funds is made to Giroux. Likewise, a recent suggestion that a member of the full-time "day school" faculty be hired on a two year contract had to be referred to Giroux.

35. Callaghan is assisted by an Assistant Divisional Director (who performs functions similar to his within a defined subject area) and three full-time clerical staff. Two of them do secretarial and clerical work for Callaghan, and one works for his assistant. There are also 15–20 part-time administrators, some of whom may work out of their homes; and, as Bennett

testified there are four or five part-time clerical staff who may be called in, as required, to do general clerical work within the school.

36. Only the full-time clerical staff and, perhaps, the Assistant Divisional Director, fall within the bargaining unit. Callaghan clearly has a higher status and level of responsibility than these individuals, but on the evidence, it cannot be said that he spends a significant proportion of this time supervising them. His primary responsibilities are organizational and administrative, rather than supervisory. He occasionally sits on hiring committees for full-time staff, completes a pro forma evaluation, and assigns clerical and secretarial tasks to the persons assisting him; however, the bulk of his time is spent organizing and administering the courses within his jurisdiction. In so doing it is necessary for him to attend numerous meetings to discuss organizational problems, budget and staff complement, with his fellow Divisional Directors. The clerical personnel, (full-time and part-time), do the mechanical work associated with the school timetable, calendar, correspondence, advertising brochures, reports and general enquiries. On one occasion Callaghan had occasion to issue a written warning to an individual who had been off sick too frequently, but none of the other Divisional Directors have ever been involved in disciplinary matters vis-a-vis the full-time (bargaining unit) personnel (who, it will be recalled, are the only persons defined as "employees" under the Act). Since, there are some 200 part-time teachers, and 15 – 20 part-time administrative personnel, the proportion of Callaghan's time spent supervising "employees" is minimal.

37. Most of the Divisional Directors' time is spent in administrative duties or meetings. Charlesworth the Divisional Director, Technical testified that he spends at least twenty hours per week in meetings. Policy within the school is determined on a collegial basis by the Divisional Directors, in consultation with Giroux. Every Monday the Divisional Directors meet with Giroux to discuss the ongoing operations of the programme, the budget, problems which may have arisen, and matters which Bennett described as "strategy for selling and pricing the product". The continuing education group considers advertising and ways to promote the school, the desirability of changing format, fees, and untapped markets.

38. Jack McGuire, "Divisional Director – Essex County", performs similar duties except that his area of responsibility is geographically defined. He too is primarily responsible for identifying and developing community curriculum needs, devising appropriate educational programmes, and arranging staff and classroom space. He administers some 350 courses at 50 different locations, and hires in the neighbourhood of 300 part-time teachers per year. Like Callaghan, he is assisted by part-time office and clerical personnel, and part-time administrators – none of whom are in the bargaining unit. McGuire has never hired, fired or disciplined a full-time employee, although, like Callaghan, he has occasionally granted casual time off. McGuire's secretary was on the respondent's full-time staff and transferred into McGuire's area. McGuire's budget is about one quarter of a million dollars and, as in Callaghan's case, consists largely of "cost recovery" funds. McGuire makes up his own budget proposal which is submitted to the Dean. McGuire regarded the recruitment of part-time staff as the function consuming most of the time. He testified that the major proportion of his time was spent hiring teachers and ensuring that the courses were run in an orderly fashion. Like Callaghan, he determines what courses are to be run, when, where, and at what cost/fee. The evaluation of full-time staff is an infrequent, and pro forma function which is entirely incidental to McGuire's major responsibilities. As in the case of Callaghan, it cannot be said that he spends a significant proportion of his time supervising bargaining unit employees.

39. None of the Divisional Directors have had any involvement with the grievance procedure, although some of them thought that they were the persons to whom a grievance would be presented. However, the vast majority of the staff of the School of Continuing Education are part-time employees excluded from the unit, and, consequently, without access to the grievance procedure. It is not surprising that the Divisional Directors have not had occasion to consider their responsibility vis-a-vis the grievance procedure. Their administrative role within the school does involve the resolution of inter-organizational problems and “bottlenecks” – personal or technical.

40. This is not the first time that the Board has been called upon to determine the status of individuals who develop and market community education courses. In *The Board of Governors of Algonquin College et al.*, [1977] OLRB Rep. May 257, the Board considered the position of twenty-two “development officers” employed by various community colleges throughout the province. The *Algonquin* decision was followed more recently in *Cambrian College of Applied Arts and Technology*, [1980] OLRB Rep. Jan. 8, where the Board was dealing with a position entitled “community program co-ordinator”. The functional similarity between the positions considered in these earlier cases and the ones presently before us, can be amply illustrated by the Board’s description in those cases of the employees’ principal responsibilities. In *Algonquin College* the Board summarized these as follows:

“Once employed by the community college the development officer’s duties were broadened to include the marketing and supervision of other training programmes designed to increase the productivity of the employer’s operations by upgrading the skills of its employees...

...the development officer would meet with various and sundry employers and employer’s associations with a view to discharge the programme that suited their needs. Once a programme is designed and accepted by the employer, then a contract is entered into whereby the employer agreed to disclose the specific terms of the arrangement. The development officer thereupon would engage the instructors required to teach the programme, furnish facilities (if not on the employer’s premises) and other material or equipment necessary to the success of the programme. In this regard the development officer within prescribed limits is authorized and responsible for making these expenditures. There is no question that the development officer, through his dealings, binds the respondent college to the terms and conditions of any negotiated arrangement. These expenditures run the gamut of negotiating the instructor’s fee, renting facilities and purchasing equipment. The duration of these programmes and the extent of the instruction as opposed to ‘on the job’ training varies with the nature of the course...

...the development officer’s principal duties are to market a product whose main objective is to increase the revenues of the college. In this context the development officer performs the duties of a salesman whose expertise as a consultant are applied to win the fancy of a company whose productivity will be enhanced by the specific training programme marketed by the officer. In this regard the college is in direct competition

with private consulting firms who in many respects market the same product.”

And in *Cambrian College*, *supra*, the Board wrote:

“Both community program-co-ordinators, Gil Dumas and Aldo Favot, are responsible to the chairman of community programs for the delivery of continuing education courses within the geographical jurisdiction served by the college. They assess the need for courses and then develop courses to satisfy those needs. Their responsibilities include the selection of teaching facilities and course instructors, the marketing and general administration of the courses. They recruit and supervise from four to eight community liaison officers and 60 to 80 part-time instructors. Both recommend candidates for hire as community liaison officers for final approval (usually granted) by the chairman. They have hiring, firing and disciplinary authority over part-time instructors. They evaluate the performance of part-time staff and handle their employment related problems. One of the co-ordinators supervises two full-time adult education instructors. The co-ordinators contract for space in the community for training courses and negotiate contracts for specialized part-time instruction services with individuals, firms and agencies.

The manager of evening programs, Helge Schmidt, has dual reporting relationships. She is a community program co-ordinator with duties, responsibilities and authority similar to Dumas and Favot and in this role she reports to the chairman of community programs. But she is also responsible to the Dean of continuing education for the operation of evening classes at one of the two Sudbury campuses of the college. In this role she deals with and resolves problems in respect of course scheduling, instructor absence, classroom allocation and the supply of services to students and instructors. She deals also with similar problems by telephone contact with satellite campuses outside of Sudbury.”

In neither case did the Board exclude the subject employees from the ambit of collective bargaining. Each of these earlier decisions involved the same statute as that is presently before us, and an employer participating in the same province-wide bargaining system and bound by the same collective agreement.

41. Strictly speaking, neither of these earlier decisions is binding upon this panel of the Board; but it must be recognized that Board decisions have ramifications beyond the immediate parties to a dispute and create reliance interests which cannot be ignored. If the system is to function effectively, there must be some certainty and finality to Board determinations, even when doctrines such as *res judicata* or *stare decisis* have no strict application. Rules established in earlier cases should generally be followed unless they can be fairly distinguished, or unless they appear to be unreasonable or clearly wrong. On the other hand, the first look at a problem does not necessarily result in the correct or best solution (in this regard see the remarks of Professor Laskin, as he then was in *Re C.G.E.* (1959), 9 L.A.C. 342 at 346-7). Board decisions are not carved in stone, and a later Board has the same freedom and indepen-

dence as did the earlier one – subject only to argument and persuasion based upon principle and authorities which now include a decision on a point similar to the one in question. Indeed, it is one of the advantages of a specialized tribunal that it entertains all cases within a defined subject area, and can develop, refine, and, if necessary, revise its jurisprudence as it acquires more experience. Of course, the Board should not depart from established principle or policy unless there are good reasons for doing so; but neither should a desire for uniformity be elevated to such preeminence, that it prevents a thorough analysis of each case.

42. The determination of employee status involves a two-step process (what the Board in *Sheridan College of Applied Arts and Technology*, [1976] OLRB Rep. Dec. 844 referred to as the “primary” and “secondary” characterization). Section 1(f) of the Act defines “employee” as a person within one of the units specified in the schedules. A perusal of the schedules will identify certain individuals – clearly excluded on the basis of readily ascertainable criteria – for example, persons employed for less than 24 hours per week (schedule 2(vi)); students employed in a co-operative training program (schedule 2(vii)); and persons engaged and employed outside of Ontario (schedule 2(xi)). In certain instances the individual’s job position may be expressly mentioned (chairmen of academic departments, for example), although in other cases, nothing will turn on a job title per se. The position of many individuals will not be specifically mentioned or may be described ambiguously. This is the case of “foremen”, or “supervisors” who are mentioned without specific criteria for their identification, and “administrators” who are not mentioned at all in those terms, and thus could be included because they are “employed in positions or classifications in the office” or excluded because they are “persons above the rank of foremen” or “other persons employed in a managerial capacity”. In our view the status of “administrator” is equivocal, and if there is a dispute concerning the position of an individual nominally designated as an “administrator” that issue must be resolved by determining whether he occupies a position, or exercises functions described in section 1(1). Schedule 2 item (v) refers to “other persons employed in a managerial capacity”, which suggests that those persons described in items (i) to (iv) must also be so employed, and must therefore exercise one or more of the functions enumerated in section 1(1). It should be noted that section 1(1) envisages a pyramid, or managerial hierarchy, which includes “at the top” persons who formulate organization objectives and policy 1(1)(i), and “nearer the bottom” front line supervisors. In addition, there are other individuals of subordinate status, whose duties and responsibilities vis-a-vis the grievance procedure, employee relations, or senior management make them “part of the management team”. Finally, section 1(1)(vi) gives the Board a general discretion to exclude other members of the management team who have not been specifically described.

43. We do not think that by describing a person as an “administrator” one conclusively determines his managerial status. In this respect, we cannot accept, without qualification, certain *obiter* comments made in *Sheridan College*, *supra* (a case which the Board itself described as one “of first impression”). As part of its general discussion of the scheme of the Act, the Board remarked:

“It should be noted that if they are characterized as professional administrators they will fall outside both bargaining units. The Act has not provided a bargaining unit for persons who are purely administrators of the College.

Following certain basic notions of collective bargaining policy the Legislature appears to have decided that the managerial nature of administrative responsibilities so identifies the professional administrators with the interest of their employer as to make them a group inappropriate for collective bargaining. The rationale underlying the conflict of interest policy, which is now conventional wisdom in North America labour relations, was well articulated by the British Columbia Labour Relations Board in *The Corporation of the City of Burnaby*, [1974] 1 Can LRBR 1 at 3. A professional administrator employed by a College would, therefore, *prima facie*, fall outside both bargaining units."

The difficulty with this proposition is that the term administrator is itself ambiguous especially as applied to a large, bureaucratic, academic organization. Within a college or university someone has to allocate rooms, prepare class timetables and exam schedules, see that instructional materials are available, co-ordinate courses, handle student admissions, answer public enquiries and so on. Such persons are "administrators" in that they administer or execute the policies or programmes determined by others, but we do not think that these administrative or co-ordinating functions, however important they may be, necessarily make an individual a part of management. If such were intended, the Legislature could have framed section 1(1)(i) with reference only to "those who are involved in the "administration of programs". There would have been no reference to "formulation of organization objectives and policy", and administrators would have been unambiguously excluded.

44. On the basis of the evidence before us, it is evident that a number of the enumerated statutory exclusions have no application. The Divisional Directors are not employed in a confidential capacity in matters relating to employee relations. Because their principal responsibilities involve the organization and "selling" of courses, and the statutory definition of employee excludes almost all of the persons with whom they work, it cannot be said that they spend a significant portion of their time supervising "employees". For the same reason, it is not surprising that none of the six witnesses had ever had any involvement with the grievance procedure, and their remarks in this regard were purely speculative. Supervision of bargaining unit employees is peripheral to their core responsibilities, and almost none of their co-workers have access to the grievance procedure. The Divisional Directors do not fall within the scope of items (ii), (iii) or (v) of section 1(1).

45. The evidence did not disclose the entire "chain of command", the role played by R. F. Giroux or L. C. Clarke in the College or their precise relationship with the Divisional Directors. Private meetings with Giroux are infrequent and there is nothing particularly confidential about the administrative matters discussed in the various meetings over which Giroux presides. Bennett, who takes the minutes, could not identify any prejudice to the respondent if the information were generally known. Several of the Divisional Directors suggested that the confidential aspect of these meetings involved the discussion of "personalities". Clearly, this is not the kind of information to which any portion of section 1(1) is directed. In the absence of precise information concerning Giroux's duties and responsibilities, we cannot find that the Divisional Directors are excluded by virtue of section 1(1)(iv).

46. The possible application of section 1(1)(i) is more problematic, since, as we have already noted, the Divisional Directors are administrators, and section 1(1)(i) requires the

exclusion of senior executive or administrative personnel. But where does one draw the line? At what point does an individual begin to exercise the kind of senior executive responsibilities to which section 1(1)(i) refers? The union proposes an “employee-related” conflict of interest test analogous to that referred to by Professor Weiler in *City of Burnaby, supra*. It is argued that to be excluded under section 1(1)(i), a person must have a decisive involvement in decisions, which, albeit indirectly, materially affect the employment relationship of employees, i.e. making decisions which determine employee complement, the skill mix of employees, new skills required by the respondent, etc. This argument was considered and rejected by the Ontario Public Service Labour Relations Tribunal in *Ontario Public Service Employees Union and The Crown in the Right of Ontario* (May 10, 1976 – unreported) – a decision involving the employee status of a senior economist in the Ministry of Labour, and the application of section 1(1)(ii) of *The Crown Employees Collective Bargaining Act*. The language of section 1(1)(ii) of *The Crown Employees Collective Bargaining Act* is identical to that of section 1(1)(i) of *The Colleges Collective Act*, and prior to the enactment of the latter statute community college employees were covered by the former. Indeed, it is apparent that with minor exceptions, the two statutes have the same pattern of statutory exclusions. After comparing the statutory scheme with that of *The Labour Relations Act*, and reviewing a number of cases decided under that statute the Tribunal observed:

“Between these supervisors covered by section 1(1)(m)(iii) and the very senior individuals enumerated in section 1(1)(m)(i) there is a range of persons who may neither supervise employees nor have much if anything to do with employees directly and who are not considered to be the heads of a particular government operation, but are excluded from being employees under the Act because they are considered part of the managerial team. Their duties and responsibilities are covered by section 1(1)(m)(ii). For example, a Ministry may have an *Assistant Deputy Minister who has little or no employee responsibilities but whose main concern is the development of policy for that particular Ministry. His time may be completely occupied in evaluating and preparing reports containing suggestions and recommendations for the development of policy.* Clearly that person would not be considered an employee because he or she would not share a community of interests with other employees in the bargaining unit for the purposes of collective bargaining.

Thus, generally and in context, section 1(1)(m)(ii) is concerned with members of the managerial team, who are usually but perhaps not always senior government personnel who, while they may not spend a significant portion of their time in supervising other employees nevertheless do not share a community of interest with members of the bargaining unit for the purpose for which the union exists.

Turning more specifically to the particular wording of the section and its application it may appear to concern itself with persons ‘involved’ in the ‘development and administration’ of government programs. *But there are very few positions, if any, in the government that are not involved with the development and administration of one program or another. In our view, the limiting words in the section and the key phrase is the requirement that the individual’s involvement must be ‘in the*

formulation of organization objectives and policy' with respect to the development and administration of programs. The section is concerned with important governmental functions and embraces those persons who are 'involved' with 'organization objectives and policy.' Clearly these are major functions of the government. But in our view mere involvement in these areas does not bring a person within the section. Many people may be involved in organization objectives and policy. For example, a clerk who surveys people using a government service or who collates information and reports on the potential cost of a policy which the government may be seeking to develop may be said to be 'involved' in the organizational objectives and policy. However, which activity the section seeks to protect is the activity of persons who are 'involved in the formulation' of objectives and policies of the organization. Thus the section seeks to exclude from the bargaining unit those who may be referred to as the decision makers who are involved in major government functions. It does not intend to exclude those who merely supply information or collate material or who make suggestions. The section, in our opinion, intends to exclude those who play a vital and decisive role in the decision making process, or in the general dictionary sense of the word 'formulate'; the section intends to exclude those who ultimately reduce all the information, suggestions and reports and systematically set them forth in the form of organization objectives and policies.

In summary after considering the general organization of the Public Service, the context of section 1(1)(m)(ii) and more particularly its juxtaposition to the remaining parts of the section, as well as its specific wording we have concluded that the *Legislature intended to exclude from the bargaining unit relatively senior members of the Civil Service who are involved as implementers and advisers in the major areas of 'organization objectives and policy' and whose functions involve them in formulating or decision making in these areas. The section does not exclude from bargaining those who are not involved in these major areas or whose duties and responsibilities involve them in these areas only in an incidental way.*"

47. The tribunal's approach focuses on the phrase "formulation of organization objectives and policies", and interprets that phrase so as to exclude only those who are senior policy makers, playing a "vital and decisive role in the decision making process" and involved as "implementers and advisers" in the major areas or functions of government. The application of this approach in the community college context would suggest that in order for an individual to be excluded under section 1(1)(i) he must do more than administer or even "develop" college programs; he must be involved in the formulation of college objectives and policy in relation to those programs. This would involve the exercise of senior executive responsibilities at the college level, respecting initiatives or priorities which the college as an institution should pursue; and support for this interpretation can be gleaned from the reference to the formulation of college budgets. The alteration of objectives and policies will have financial ramifications and it is appropriate that individuals charged with the responsibility for the college's financial management should be excluded on the same basis as planners and policy makers. Of course, once a new college objective or policy is determined,

less senior managerial personnel will have to develop new programs or administrative structures; but we do not think the two levels of authority should be equated. The distinction is an important one which, in the sphere of military science, would be described as the difference between “strategy” and “tactics”.

48. In the present case, it is difficult on the evidence before us, to conclude that the Divisional Directors play a “vital and *decisive*” role in the determination of college objectives and policy as that term is used in section 1(1)(i). They do develop “sales” initiatives, which may be accepted by Giroux and their colleagues, and subsequently initiated, but Giroux through his control over the budget and spending of each Divisional Director, and his active participation in the ongoing affairs of the school, retains ultimate authority over the school’s activities. The Divisional Directors have an important role in developing courses, selling them to the public, and ensuring that, once sold, the “product” is efficiently delivered to the consumer; but final authority for the creation, cancellation or content of courses lies elsewhere. Likewise, there is only a limited discretion with respect to fee structure, the salaries of part-time teachers and their contractual arrangements, and any change in complement requires approval by higher authority. It is difficult to characterize the Divisional Directors as primarily or predominantly policy makers, – especially where, as here, the Board did not have a complete picture of the structure or levels of authority with the respondent institution. However, in view of our finding with respect to the application of section 1(1)(vi), it is unnecessary to reach a firm conclusion with respect to the applicability of section 1(1)(i). As we have already pointed out, an individual must be excluded from the bargaining unit if *any* of the enumerated statutory exclusions applies to him.

49. The scheme of *The Colleges Collective Bargaining Act* envisages that there will be persons who do not have significant direct supervisory responsibilities over bargaining unit employees, are not involved in the collective bargaining process and do not exercise senior executive or policy-making responsibilities; but are nevertheless excluded from the bargaining unit by reason of their duties and responsibilities to the employer. These persons are referred to in section 1(1) of the Act, schedule two item (v) and perhaps schedule two item (iii). Such individuals may be described as “middle-management” in that their status within the organization is subordinate to that of senior executives or administrators, but clearly superior to that of bargaining unit personnel, and perhaps “first-line supervisors”. These “middle-managers” are the “organization men” who have important responsibilities for administering and executing the policies or programmes of the employer. For this reason they are part of, and share a community of interest with management. They are intermediate members of the management team whose functions are not specifically described in section 1(1)(i) – (v). This is not to say that the mere assertion that an individual is a member of “middle-management” or part of the “management team” will justify his exclusion under section 1(1)(vi). As we have already mentioned, almost all white collar employees who do not exercise simple manual skills could be described as “administrators” but we do not think the bargaining unit was intended to include only junior secretarial and clerical personnel. Despite the unique institutional and labour relations context of a community college, we do not think that the Legislature intended to create a definition of “management” markedly different from the ordinary understanding of that term in the private sector nor was it intended to generate an unusually or disproportionately large “team” of managers. There must be a reasonable relationship between the number of managerial personnel and the number of employees in the bargaining unit; and before a position can be considered managerial the evidence must demonstrate that there is a significant focus of decision-making authority at that point in the organization. On the other

hand, if, on the evidence, and in the context of the particular organization, the Board is satisfied that an individual or group performs functions properly characterized as managerial, it should not hesitate to do so declare simply because its decision must be grounded on the general discretion set out in section 1(1)(vi).

50. The Divisional Directors and the two Assistant Divisional Directors do not have ultimate responsibility for the determination of policy within the School of Continuing Education, but there is no doubt that it is they who actually run the programme on a day-to-day basis. It is the Divisional Directors who develop and market courses, hire faculty, and generally ensure the orderly and efficient delivery of these educational services. Although the evidence in this respect is unclear, it would not be surprising to learn that in terms of remuneration, and responsibility (their "Hay points") they would be regarded as persons above the rank of first-line foremen or supervisors. They have direct responsibility for selecting, hiring, and if necessary, terminating the services of literally hundreds of part-time teaching staff – a factor which would be of considerable significance if this case were considered under section 1(3)(b) of *The Labour Relations Act*. The exercise of this authority does not directly impact on employees in the bargaining unit because, by statute, part-time employees are excluded from the ambit of collective bargaining; but it is still an indication of managerial status. Although the Divisional Directors do not manage "employees" they do select and direct the "non-employees" who actually produce the respondent's "product". In this sense the Divisional Directors are responsible for the "management" of the respondent's continuing education programme. Indeed, it would be curious to hold, as the union suggests, that the entire continuing education programme involving thousands of students, hundreds of courses, hundreds of part-time teachers, and dozens of part-time clerical personnel, is managed solely by R. F. Giroux. In the absence of considerably more evidence than is currently before us considering the way in which the School of Continuing Education fits into the general framework of the respondent's organization, and in the absence of any evidence of significant managerial control exercised by persons outside the school, we are compelled to conclude that the school, is, in fact, managed by Giroux, the five Divisional Directors and the two Assistant Divisional Directors. On the basis of the evidence before us, they are clearly part of the respondent's managerial team, and while they are not covered by sections 1(1)(i) (iv), we are satisfied that, in accordance with section 1(1)(vi), they should not be included in the bargaining unit by reason of their duties and responsibilities to the employer. We might point out, moreover, that there was no evidence before us suggesting that this determination would result in an unreasonable ratio of managerial to non-managerial personnel within the institution, or would significantly undermine or erode the trade union's bargaining rights.

51. For the foregoing reasons the Board finds that the Divisional Directors and Assistant Divisional Directors must be excluded from the bargaining unit.

DECISION OF BOARD MEMBER D. B. ARCHER:

The decision of Mr. Archer will follow.

0554-80-U Eva Burt, Complainant, v. Thomas Product Co. Ltd., Respondent.

Practice and Procedure – Section 79 – Complaint not alleging violation of act – Board dismissing without hearing under Rule 46

BEFORE: George W. Adams, Chairman and Board Members J. A. Ronson and C. A. Ballentine.

DECISION OF THE BOARD; July 2, 1980

1. This is a complaint filed by Eva Burt pursuant to Section 79 of *The Labour Relations Act*. The complaint names Thomas Product Company Ltd. as respondent and “District 65 D.W.A. and C. Local” as an interested party. The complaint is contained only on the first page of Form 32 and does not set out what sections of the Act the respondent is alleged to have violated. Also enclosed with the complaint and an accompanying letter describing the actions complained of and requesting reinstatement and removal of discipline was a cheque in the amount of \$10.00 with no payee named.

2. It appears to the Board that the essence of the complaint against the respondent employer is that the complainant was improperly demoted, and was subsequently suspended for three days without pay.

3. The complainant has not alleged what sections of the Act have been contravened, nor has she alleged any particulars which disclose a violation of *The Labour Relations Act*. She does not suggest that she was demoted because she had engaged in trade union activity, nor does she allege that the Union has failed to adequately represent her. The complaint simply contests the action of the respondent employer in demoting the complainant.

4. Under Section 79 of *The Labour Relations Act*, the Board has jurisdiction only to deal with complaints which allege a violation of the Act. (See *Ernest D’Anrea*, [1975] OLRB Rep. Aug. 646; *National Sea Products*, [1961] OLRB Rep. May 61). The demotion of an employee without just cause, while possibly being a violation of a collective agreement, if one exists, does not by itself contravene *The Labour Relations Act*. There is therefore nothing in the complaint disclosing a violation of the Act.

5. Section 46 of the Board’s Rule of Procedure, Regulation 551, R.R.O. 1970, provides:

“Where an application or complaint does not, in the opinion of the Board, make out a prima facie case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall, in its decision, state the reason for the dismissal.”

Rule 46 permits the Board to dismiss a complaint or application without a hearing where the complaint or application does not, on its face, make out a case for the remedy requested. The power given to the Board under Rule 46 is used in only those cases where there is nothing contained in the complaint or application which would permit the Board to give the complainant

or applicant the relief sought. See *Ford Motor Company*, [1972] OLRB Rep. Sept. 828; *Concrete Construction Supplies*, [1979] OLRB Rep. Dec. 1152.

6. The complaint must be dismissed. The Registrar is directed to return the cheque which was enclosed with the material to the complainant.

7. The Board directs the complainant's attention to Section 46(2) and (3) of the Board's Rules of Procedure which provide:

46(2) "The applicant or complainant may within then days after he is served with the decision of the Board under subsection 1 request the Board to review its decision".

46(3) "A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies".

The Board may, upon an application for review, reconsider its decision if the complainant can satisfy the Board that its original decision was incorrect. The complainant may also file a fresh complaint against her employer or trade union alleging facts which disclose a violation of *The Labour Relations Act*.

0110-80-R Tilco Plastics Employee's Association, Applicant, v. Tilco Plastics (1976) Limited, Respondent.

Trade Union Status – Managerial and supervisory persons actively involved in organization – Employer lending support to preparation and circulation of membership documents – Board not finding status

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members B. L. Armstrong and J. A. Ronson.

APPEARANCES: *Peter Millard, Maureen Montgomery, Linda Bullock and Lorraine Pammett for the applicant; Ken Butcher for the respondent.*

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; July 7, 1980

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2. This is an application for certification. The applicant employee organization has never previously appeared in any proceeding before the Board and, accordingly, is required to establish that it is a "trade union" within the meaning of section 1(1)(n) of *The Labour Relations Act*. Ms. Maureen Montgomery, president of the applicant, gave evidence concerning its origins. The facts are not in dispute.

3. In November, 1976 a group of managerial and non-managerial employees decided that, instead of a trade union, they would form an employee association which would include all employees of the respondent, and would meet with the owners of the company to discuss employee problems and terms and conditions of employment. John Armstrong, maintenance foreman, Gail Arnott, secretary to Ken Butcher the president of the company, Eric Bloomfield, a foreman, and Maureen Fowler "assistant-forelady" in the finishing department, were among this founding group. The group approached the owners and senior management (Ken Butcher President, Ted Robinson vice-president, and Pat Baker sales manager) to request permission to hold a meeting on the company premises for the purposes of discussing the formation of the association.

4. On November 19, 1976 the employer agreed to shut down the company's operation so that the employees could conduct their founding meeting. The meeting was held on the premises and was attended by all managerial and non-managerial personnel. John Armstrong was the principal spokesman who explained the benefits to be gained by forming an employee association. It was decided that an association should be formed, and that it should include all hourly rated and salaried employees except the "owners" (i.e. Butcher, Robinson and Baker). Later that day the pro-tem executive of the association approached the "owners" and were recognized by them as the employees' representative. A notice to this effect was posted on November 22, 1976.

5. In December a meeting was held at the home of one of the employees, to discuss the writing of a constitution. The meeting was attended by the original "prime movers" behind the association, as well as some twenty-five other employees. A constitution was drafted and approved; and officers were elected pursuant to its terms. In the years following its formation the association apparently had an amicable relationship with the employer.

6. Ms. Montgomery testified that anyone who becomes an employee of Tilco, automatically becomes a member of the association. There is a form attached to their employment application which is signed by the employee agreeing to membership and an automatic dues deduction. Ms. Montgomery told the Board that this membership dues requirement is not part of the association's agreement with the employer because it happens automatically. In the early days of the association's existence, not all employees were members and, the association's minutes indicate that it did not purport to represent or take grievances on behalf of non-members. Now however, it would seem that there is only one individual who is not a member of the association.

7. During the last set of negotiations with the company, the members of the employee association decided that it might be appropriate to become certified as the employee's exclusive bargaining agent. They informed the employer of their intention and were advised that it had no objection. On April 18, 1980 the organization applied for certification for "all hourly rated and salaried employees" - a description which, Ms. Montgomery explained, would include all managerial and non-managerial persons other than the owners. The association sought certification for a bargaining unit consistent with its membership, and the group of employees whom it had historically represented. Among this group were John Armstrong, plant superintendent, Linda Bullock, payroll supervisor and secretary to the president, and other managerial employees. At the hearing the parties proposed that Ms. Bullock, as secretary to the general manager and payroll supervisor should be excluded from the bargaining unit; however the proposed unit upon which the parties agreed still extends to foremen and supervisors. All of these managerial personnel were involved in the organizing campaign at least to

the extent of signing membership documents. These membership documents were typed by Linda Bullock and copied on the respondent's photocopying machine. The association approached Mr. Butcher, the president and asked for permission to solicit membership in the company cafeteria. Permission was granted, a table was set up, and all of the membership documents were collected in this way.

8. The statutory provisions relevant to this application are as follows:

1.-(1)(n) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

1. (3) Subject to section 80, for the purposes of the Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

12. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

40. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

(a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or

(b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

9. It is fundamental to the scheme of the collective bargaining regulated by *The*

Labour Relations Act that there be a clear separation between managerial and non-managerial employees, and that the employees' bargaining agent be entirely free of managerial influence. This basic principle is expressed in a number of statutory provisions beginning with section 1(3)(b) which excludes managerial personnel from the statutory definition of "employee". Thus, managerial persons cannot form a "trade union", be covered by a "collective agreement" or seek the protection of *The Labour Relations Act* (see *Barbara Jarvis v. Assoc. Medical Services Inc. et al* (1964), 44 D.L.R. (2d) 407 (S.C.C.)). The rationale for the exclusion of managerial personnel was succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby et al*, [1974] Can LRBR 1 at page 3:

"The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management – on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management's identification with its interests diluted by participation in the activities of the employees' union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employees organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the

senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of the employees, the law directed that a person must leave the bargaining unit when he is promoted to a position where he exercises management functions over it."

Similar views were expressed in *Ontario Hydro* [1971] OLRB Rep. Aug. 501 – a case in which the Board declined to grant status to an organization in which managerial personnel had been involved. At page 504 the Board remarked:

"This Board over the years has refused to give status to purported trade unions on the basis that members of management are or have been involved in its organization. There are many cases on that point. The whole spirit of *The Labour Relations Act* is to provide trade unions with a separate and distinct identity from management in order to maintain their integrity in dealing with management. See e.g. section 10, section 13(b) and section 48. Indeed, section 48 makes it an unfair labour practice for management to involve itself in certain trade union affairs. The spirit of the legislation and the cases before this Board which have invoked that spirit resulted because of the potential for a conflict of interest with respect to certain issues in collective bargaining. That is not to say that co-operative and harmonious relations do not exist between employers and trade unions. But it does consider that on occasion there will be issues where relationships must be maintained at arms length. To this end the Legislature has required that trade unions be free from any type of management involvement. The "potential for conflict of interest" which Mr. Scott admits exists in his organization is precisely the problem that the legislation has attempted to resolve by requiring that trade unions be separated from management. We pause to note that even the original certificate obtained in 1947 was restricted to professional engineers who were "employees". On the basis of the evidence before us we have no alternative but to find that the applicant is not an organization of employees but is an organization of both employees and persons exercising managerial functions and accordingly it does not come within the definition of a trade union contained in the Act.

Our decision does not mean that bona fide bargaining has not taken place between the parties with respect to wages and working conditions or that bona fide bargaining could not take place in the future. Our concern is with the "potential for conflict". We also recognize that the parties may voluntarily agree to bargain collectively for managerial persons and while certain other legislation has recognized that managerial persons are appropriate for collective bargaining there is no such legislation in this Province and this Board does not have the jurisdiction to go beyond the terms of the legislation as it presently exists."

The Board reached the same result in *Armour Associates Ltd.* [1976] OLRB Rep. Mar. 117, where it emphasized that (as here) it was not faced with a mere possibility that non-employees could be admitted to membership, or with a mistaken belief by certain managerial persons that

they were employees for the purposes of the Act (see: *Chrysler Canada Ltd.*, [1975] OLRB Rep. Nov. 852; *Children's Aid Society of Metropolitan Toronto*, [1976] OLRB Rep. Dec. 861).

10. The import of sections 12, 40 and 56 is abundantly clear. Organizations which have received the active or tacit support of the employer cannot be certified nor can they conclude a "collective agreement" within the meaning of *The Labour Relations Act*. Strictly speaking, it is impossible for such organizations to carry out their responsibility under section 14 of the Act – to make every reasonable effort to make a "collective agreement" – because any agreement reached would not be a "collective agreement" within the meaning of the Act. Such organizations can continue to exist outside the framework of the Act (see: *Ontario Hydro, supra*) and may even represent their members in a manner satisfactory to them; however if such organization seeks the rights, obligations and protections of *The Labour Relations Act*, it must first purge itself of managerial influence and demonstrate that it is entirely independent of employer support.

11. In the present case the evidence conclusively demonstrates that managerial personnel have been actively involved in the organization from its inception, are presently members and that as recently as March of 1980, the respondent has lent its support to the preparation and solicitation of the applicant's documentary evidence of membership. In the circumstances we are not satisfied that the organization is a "trade union" within the meaning of section 1(1)(n) of *The Labour Relations Act*; and in any event, section 12 would prevent the Board from issuing any certificate to it.

12. In the result the application is dismissed.

CONCURRING DECISION OF BOARD MEMBER J. A. RONSON:

1. While I concur in dismissing the application, it is only on the basis that the Applicant must purge itself of those members who are managerial personnel, (*York University*, [1975] OLRB Rep. Feb. 127).

2. The evidence of Ms. Maureen Montgomery does not lead me to conclude that at the time of the application the Respondent had participated in the formation or administration of the Applicant or was contributing financial or other support to the Applicant so as to contravene s. 12 of the Act. In fact, Ms. Montgomery stated that the reason for bringing this application was to expedite negotiations with the Respondent Company.

0082-80-U Cliff Wilson, Complainant, v. United Brotherhood of Carpenters and Joiners of America and Local Union 2737, Respondent.

Duty of Fair Representation – Union official knowingly misleading grievor as to status of grievance – No balancing of interest between individual and group established – Violation of section 60

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members H. J. F. Ade and C. Ballentine.

APPEARANCES: *M. P. Forestell for the complainant; T. G. Harkness and Barney Wunovic for the respondent.*

DECISION OF THE BOARD; July 23, 1980

1. This is a complaint filed under section 79 of *The Labour Relations Act*. The complainant, Mr. Cliff Wilson, alleges that he was dealt with by Mr. Barney Wunovic, the business agent for the respondent union, in a manner that was arbitrary, in bad faith and thus contrary to the union's duty of fair representation contained in section 60 of the Act.

2. Cliff Wilson had worked for Fairline Boats Limited in Niagara Falls, Ontario for three years when he was permanently laid off on December 10, 1979 along with several other employees. The company was then experiencing severe financial difficulty and was under the threat of having to close down its operations. That in fact occurred in March, 1980.

3. Wilson was the most senior carpenter employed at Fairline Boats Limited. At the time of the lay-off management made no complaint about his work and provided him no reason for the lay-off. For further information Wilson called Barney Wunovic, the business agent for the respondent union. Wunovic told him that he knew he'd been laid off. Further, he told Wilson he believed that the whole place would be shut down within the week. Then Wilson pressed him for an explanation as to why he was being laid off out of seniority. Wilson's uncontradicted evidence reveals that Wunovic responded by suggesting that Wilson didn't care about his employer losing money. In the Board's assessment Wunovic displayed little inclination at this point to listen to Wilson's complaint or to attempt to provide him with an explanation of the order in which the employees were being laid off.

4. Investigating on his own, Wilson learned that he was entitled to two weeks' severance pay rather than one. He called Wunovic. After some amount of persuasion Wunovic agreed to look after the matter. Ultimately Wilson received the second weeks' pay.

5. During the week of December 16th, Wilson called Wunovic again. The business which he had been told would close within the week was still operating and he wanted to file a grievance.

6. Wunovic directed him to see the union steward. When Wilson replied that he had been laid off too, Wunovic said that he should see the other steward, Walter Trask. When Wilson went to see Trask he was told that Trask wasn't really a union steward and that, in any event, he had no grievance forms. He then went to the union office and was told by the secretary to write to Mr. T. G. Harkness, another union official, for a grievance form.

7. At a general membership meeting on January 21, 1980 Wilson raised the matter of his lay-off and his desire to file a grievance. As a result, Wunovic was directed by the president of the Local to file a grievance for Wilson. Within two days a formal grievance dated January 23, 1980 was filed by Wunovic on behalf of Wilson and three other employees laid off at the same time. Though Wilson asked Wunovic for a copy of the grievance at the time it was filed and then again at the February general membership meeting, he had not received one by the time of the Board's hearing.

8. The day after he filed the grievance Wunovic received both an oral and written reply to the grievance from Mr. Alan Jones, the president of the company. Jones justified Wilson's lay-off out of seniority on the basis of his not having skill equal to the other employees to perform the finishing work on the boats, the only type of work still being carried on by the company. Mr. Jones stated in his reply to Wunovic,

"Cliff Wilson performs only bench work, because of the state of completion of the remaining work there is virtually no bench work left to do. per 6:01 (d)"

9. The articles of the collective agreement referred to by Jones in his full reply are set out below:

"ARTICLE 6 – MANAGEMENT RIGHTS

6.01 The Union recognizes and acknowledges that the management of the plant and direction of the working force are fixed exclusively in the Company and without restricting the generality of the foregoing, the Union acknowledges that it is the exclusive function of the Company to:

• • •

(d) determine the nature and kind of business conducted by the Company, the kinds and locations of plants, equipment and materials to be used, the control of materials and parts, the methods and techniques of work, the content of jobs, the schedules of production, the number of employees to be employed, the extension, limitations, curtailment or cessation of operations or any part thereof except as specifically limited by the express provisions of this Agreement.

ARTICLE 16 – SENIORITY

16.01 ...layoffs...shall be based upon the following factors:

(a) Seniority:

(b) Skill, competence and efficiency to do the work of the job.

When factor (b) is relatively equal, seniority shall govern."

10. Up to the date of the Board's hearing Wunovic, by his own admission, had not informed Wilson, the union membership or any union official that the company had given a negative written reply to the grievance. Furthermore, Wunovic admitted that he never related to Wilson the explanation Jones gave for Wilson's lay-off out of seniority.

11. At the next general membership meeting which took place in the last week of February, 1980 Wilson asked about his grievance. Wunovic told him that it was still being processed and provided him with no further detail. He did not tell him that he had already received the company's negative reply. When asked how long it would take to process the grievance, Wunovic, according to Wilson's uncontradicted testimony, told him it could take as long as three months. The Board finds this a strange reply in view of the time limits for the various stages of the grievance procedure set out in the collective agreement. Mr. Arthur Varty, the former business agent of the respondent union, was in attendance at the February meeting and testified that other members spoke in support of Wilson's position that the grievance should be processed.

12. At the March general membership meeting it was reported that Fairline Boats was in fact closing. Wilson raised his grievance and was again told by Wunovic that it was being processed. Wunovic's reply to Wilson's further question as to what could be done about his grievance is a matter of conflicting evidence. Wilson testified that Wunovic told him, "As far as your grievance is concerned you can shove it up your nose." Wunovic testified, on the other hand, that he said, "As far as this grievance is concerned, because the company is defunct, I might as well stick this grievance up my nose." Wunovic stated to the Board that he had to rush to another meeting and only attended the March meeting for the first few minutes to give a report to the membership. He admitted that his response to Wilson was terse.

13. At the Board's hearing Wunovic reluctantly admitted that he should have told Wilson about the company's reply. He said, however, that at the time, with the threat of an imminent shutdown, he felt that "there were more monumental things [to consider] than the petty grievance of an individual". He said that at that time "his grievance sounded so insignificant because it related only to an individual" while his primary concern was to keep the company in operation. In this regard he told the Board that he spoke with Jones on three occasions to try to resolve the company's problem and keep it open. He said that when he told the membership in February that the matter was pending he was hoping that another company would purchase the business and then reinstate the laid off employees. Reinstatement alone, however, even if it had been forthcoming, would not have been responsive to Wilson's complaint that he had been wrongfully laid off in the first place and thus wrongfully denied employment up to the point of any reinstatement.

14. Section 60 of the Act imposes a duty on trade unions to represent the employees in the bargaining unit in good faith and in a manner that is not arbitrary, discriminatory or in bad faith.

15. In this case the evidence establishes that Wunovic, knowingly and without any regard to the consequences, misled not only Wilson but also the general union membership about the status of Wilson's grievance. When Wilson asked Wunovic at both the February and March general membership meetings what was happening with his grievance he was told it was being processed. This response was not even colourably accurate. The day after he filed the

grievance, or close to a full month before the February general membership meeting, the business agent received a formal reply from the president of the company turning down Wilson's grievance. Thus despite any further conversations Wunovic may have had with Jones on the issue, the grievance had been processed as far as it could be short of arbitration.

16. The collective agreement set out four steps to the grievance procedure in Article 14.04. At Step One an employee discusses the grievance with his department foreman and ultimately may, at Step One, present the grievance in writing to his department foreman through his shop steward. The department foreman must then provide a written reply within two days.

17. At Step Two, if dissatisfied with the department foreman's reply, then either the shop steward or the employee may within two days refer the matter in writing, on a grievance form, up the ladder to the production manager. He, in turn, is obliged to answer in writing within two days.

18. If still dissatisfied, Step Three provides that within three days of the production manager's answer the union can submit the grievance in writing to the general manager or his designate. At this stage the grievance must consist of a statement of facts and the relief sought and specify the section(s) of the collective agreement claimed to have been violated. Within five days of the receipt of the grievance by the company the shop steward and business representative are to meet with the company and discuss the grievance. Within five days of that meeting the company's reply must be delivered to the union.

19. If the grievance is not settled at Step Three then Step Four of the procedure states that "within ten days of receipt of the written decision referred to in Step Three, the grievance may be referred to Arbitration."

20. Article 14.03 stipulates that the [t]ime limits in the grievance and arbitration procedure must be upheld." Provision is made for extension of the time limits only if mutually agreed upon by both parties.

21. The evidence does not reveal whether Wilson had a department foreman as referred to in Step One of the grievance procedure or whether there was in the company at the time a production manager as referred to in Step Two. Since the company was winding down its operation and in the process of going out of business at the time, it may not have been running at full management capacity. Though Wilson spoke to the shop steward about his grievance as anticipated in Step One, the shop steward could not provide him with the grievance form needed to file a grievance at Step Two.

22. It appears on all the evidence that this grievance, without objection from the company, was first filed at Step Three of the grievance procedure rather than at Step One or Two. It went in the first instance to the highest person in the company; it was set out in the detailed form required at Step Three and the business representative met with the company to discuss the grievance as further required at Step Three. The next step to be taken in pursuit of the grievance, therefore, would have been arbitration. Wunovic had received the company's response at Step Three and there was no further processing to be done short of deciding whether or not the grievance should be carried to arbitration.

23. Not only was Wilson misled by Wunovic's misrepresentation of the status of his grievance he was also prejudiced. He was never told the grounds upon which the company justified his lay-off out of seniority. He was unable, therefore, to discuss the merits of the company's position with Wunovic, a process which could have clarified any misunderstanding with respect to Wilson's skill and ultimately might have resolved the matter. Furthermore, and more importantly, Wilson was deprived of the opportunity within the time limits established in the collective agreement to urge the union to pursue his grievance to arbitration. The collective agreement stipulates that the grievance be referred to arbitration within 10 days of the company's written reply. At the date of the Board's hearing three and one half months after the reply, Wilson had still not been informed that the company had submitted its last reply short of arbitration. Through Wunovic's neglect to inform Wilson of the company's reply and his knowing misrepresentation at the general membership meetings in February and March, Wilson was denied the opportunity to ask the union to take his grievance to arbitration.

24. Wunovic admitted at the hearing that he viewed Wilson's grievance as insignificant because it only dealt with an individual at a time when the impending company closing was threatening everyone's job. While Wunovic's desire to save the respondent's operation was commendable, it does not justify his utter neglect of, or misrepresentation with respect to, Wilson's grievance. In dealing with complaints under section 60 of the Act, the Board has repeatedly recognized that the union, in considering the interests of the majority of the membership, may at times find that it must act in a manner that runs counter to the particular interests of an individual. This would occur where the interests of the individual and the interests of the membership as a whole are found, after consideration by the union, to be divergent. It does not, however, justify arbitrary or bad faith conduct by a union against an individual. This is not a case where circumstances forced the business representative to strike a balance between the individual and the majority. (See the Board's decision in *Walter Princesdomu*, [1975] OLRB Rep. May 444, and the cases cited therein; *Nick Bachiu*, [1975] OLRB Rep. Dec. 919 and *Antonio Melillo*, [1976] OLRB Rep. Oct. 613.)

25. In this case Wilson's interests were not in conflict with the interests of the majority of the membership. It is understandable that Wunovic wanted to see the respondent's business continue to operate so that employees wouldn't lose their jobs. There is no evidence to suggest, however, that Wunovic would have jeopardized this interest of the majority by telling Wilson the status of his grievance. Efforts he might have made on behalf of the majority to prevent the closing of the respondent's business do not justify his complete neglect of Wilson's grievance, a grievance which the union president at a general membership meeting directed him to process.

26. Wunovic's conduct is more than a mere error of judgment in pursuing his duties; it cannot be said that he was merely careless or negligent or that he made a simple mistake in processing Wilson's grievance. While some forms of carelessness may fall outside the protection of section 60, a substantial misrepresentation knowingly made to the detriment of a member's fundamental rights does not. The evidence satisfies the Board that Wunovic's treatment of Wilson's grievance was inconsistent with the duty of fair representation. His attitude was so indifferent and summary that it may properly be described as arbitrary. Furthermore, because he knowingly misrepresented the status of Wilson's grievance, Wunovic's conduct constitutes bad faith. (See *Walter Princesdomu*, *supra*.)

27. Pursuant to section 88(2) of the Act, a union is responsible for the acts of its officers.

The Board, therefore, declares that the respondent has acted contrary to the duty of fair representation and must be held responsible.

28. The evidence presented at the hearing established that the respondent had closed its place of business. In the circumstances, the Board has decided to allow the parties the opportunity to decide for themselves, in view of the situation existing at the time of the release of this award, how Wilson can best be compensated for the respondent's breach of the Act. In fashioning their remedy, the parties should ask themselves how Wilson may most closely be placed in the position he would have been in if there had been no breach of the Act.

29. The Board remains seized of this matter in the event that the parties are unable to agree on the proper implementation of this award.

**2182-79-U Greater Northern Ontario Trucking Association,
Complainant, v. Walker Brothers Quarries Limited, Respondent.**

Discharge for Union Activity – Employee – Grievor employing other drivers – Grievor's services terminated – Grievor not employee at termination – Seeking to become dependent contractor – Whether Board having jurisdiction – Actions of grievor not on behalf of trade union – Whether grievor exercising rights under the Act

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Balentine.

APPEARANCES: *Rejean Parise for the complainant; E. Rovet for the respondent.*

DECISION OF THE BOARD; July 22, 1980

1. This is a complaint filed pursuant to the provisions of section 79 of *The Labour Relations Act*. The complainant alleges that the grievor, Mr. Ian Cameron, was laid off by the respondent on January 11, 1980, contrary to the provisions of sections 56, 58 and 61 of the Act.

2. The respondent, Walker Brothers, is primarily in the business of operating a quarry in Thorold, and marketing the products from that quarry. In addition, the respondent operates two other quarries, one at Vineland and one at Ridgemount, together with a small sand pit known as St. David. The respondent does not own any of its own trucks for the haulage of this material, but rather has always relied upon various types of owner-operators. Until December of 1979, the respondent was employing ten trucks on a regular basis to service its Thorold quarry. Eight of these trucks were provided by individual owner-operators, and two of the trucks by the combination of Mr. Cameron and his wife. In recent times, Mr. Cameron was not himself driving either of those two trucks. In December of 1979 the complainant trade union was in the process of organizing the owner-operators of the respondent, and at the same time the respondent announced that it was turning its trucking requirements over to two "multiple" brokers. It appears that some, if not all of the drivers were told that

employment would be available through the brokers. In any event, all of the drivers of the respondent were laid off. The complainant then filed a section 79 complaint seeking the reinstatement of all of its members. That complaint was settled early in January, 1980, with the result that all of the previous operators were put back to work by the respondent, including the grievor through his drivers. A few days later, however, the grievor (through his drivers) was again laid off, and it is that lay-off which forms the subject matter of the present complaint.

3. The respondent's evidence was given by Mr. Archie Reynolds, a Sales Representative and Truck Co-ordinator for the respondent. It is his responsibility to arrange the trucking for the quarry operations. It was common ground between the parties at the time of the certification and the settlement of the first section 79 complaint that Mr. Cameron was neither eligible for membership in the complainant trade union, nor for inclusion in the respondent's bargaining unit of dependent contractors. Mr. Reynolds testified that Mr. Cameron's trucks were put back to work along with the others by way of oversight following settlement of the section 79 complaint, and Mr. Cameron's trucks were again laid off when the error was noticed. Mr. Reynolds testified that lay-offs had occurred at this time of the year in all but the immediately preceding year, and that it was the respondent's practice in such situations to rotate the available work amongst all of the owner-operators. Mr. Reynolds further testified that the respondent agreed, at the request of the complainant, in January of 1980 to maintain a similar practice amongst all of the members of the bargaining unit, rather than assign work by seniority. A collective agreement has now been entered into by the parties, after only two negotiating meetings.

4. Mr. Reynolds testified that work both before and after the December lay-offs has been slow. The respondent's practice since that time has been to allocate the available work amongst the members of the bargaining unit, and then if an excess existed, to call upon its regular owner-operators employed at the Vineland and Ridgemount sites. He indicated that the only time that independent contractors were called upon by the respondent was to haul one or two isolated loads at the end of a day, where that contractor already had a truck stationed at the respondent's yard. He acknowledged, for example, that the respondent had on occasion engaged the services of Danny Fast, a multiple operator, to haul some of its loads, but pointed out that Danny Fast was a contractor who, because he purchases a large quantity of his materials from the respondent, regularly stations his own trucks at the respondent's quarry. The respondent, therefore, engages such a truck to haul an occasional load when the respondent's own operators are not available. If, however, a full day of surplus work is available, preference is given to one of the operators at Ridgemount or Vineland. He added that most days the respondent did not have enough work to keep even the original eight operators fully engaged.

5. Mr. Reynolds acknowledged that the giving of work to drivers at Vineland or Ridgemount ahead of, for example, Mr. Cameron, was a new practice, but further explained that the downturn in business had affected the drivers regularly employed by the respondent at those two locations as well. Further, Mr. Reynolds testified that the company was not prepared to permit Mr. Cameron to continue to share in the allotment of work with the original eight owner-operators because the respondent felt that its first loyalty was to the actual members of the bargaining unit. The respondent was concerned as well that if Mr. Cameron's two trucks were added to those sharing in the limited amount of work available, the resultant drop in *per capita* income would likely produce a bargaining demand for higher rates in future negotiations.

6. The grievor, Mr. Cameron, also gave evidence before the Board. He acquired his first truck some twenty years ago, and has been providing services to Walker Brothers since that time. Over the course of time he acquired additional trucks, to the point where some twelve to fourteen years ago he owned six trucks, the additional trucks being driven by persons that he hired. Mr. Cameron's wife, Joan, also bought a truck about two years after Mr. Cameron did, and Mrs. Cameron appears to have assumed all responsibility with respect to the operation of her own truck, including hiring a driver to drive it. In spite of this, the arrangement between Mr. Cameron and his wife respecting the two trucks is clearly in the nature of a partnership, as they both share in the profits from each truck, and file a single tax return. Mr. Reynolds testified that there had always been some confusion over the ownership of the second truck as between the grievor and his wife, but it is clear that the respondent was at least aware of the involvement of Mrs. Cameron with respect to the second truck.

7. Mr. Cameron further testified that he drove his truck himself from 1974 until the latter part of 1978, when he accepted the job of "business agent" with the Niagara Region Haulers' Association. That Association was formed some years ago to represent the various owner-operators in their dealings with quarry owners in the peninsula. Its membership is comprised of owner-operators of all types, ranging from owner-operators of a single vehicle to large multiple brokers who own a number of vehicles and employ a number of drivers. Mr. Reynolds for the respondent conceded that Mr. Cameron during his tenure as business agent was regarded by the respondent as spokesman for the owner-operators, and that complaints from the drivers generally came by way of Mr. Cameron. It is common ground between the parties, however, that the Niagara Region Haulers' Association was not, and is not, a "trade union" within the meaning of *The Labour Relations Act*. Mr. Cameron acknowledged that at the time of the respondent's decision in December of 1979 to lay off its owner-operators and employ multiple brokers, the President of the respondent indicated to him that the reason for doing so was because things were no longer "running smoothly" within the Association itself. Mr. Cameron further acknowledged that a split had developed amongst the Association's members between persons owning tandems, and those owning tractor-trailers. When Mr. Cameron was laid off immediately after his reinstatement in January, he was told by the respondent that he was not a part of the bargaining unit, and that his services were no longer needed. The following week he was told by the respondent that there was not enough work for him. Mr. Cameron testified that at that time he laid off his own driver and was prepared to driver his truck himself, because, owing to a shortage of funds in the Association, his job as business agent had come to an end. He testified that he had been asked by the Association to resume the position when funds were again available, and indicated to the Board that it was his intention at the time to do so.

8. Joan Cameron, wife of the grievor, gave evidence that she attended at the office of Norris Walker, President of the respondent, in early spring to ask why her truck was not being called into work. She asked Mr. Walker if it was because she was a woman in the trucking business, and Mr. Walker replied that it was not. She then asked Mr. Walker if it was because she was married to Ian Cameron, to which Mr. Walker also replied that it was not. Mr. Walker then stated that it was "because of the union". On cross-examination, Mrs. Cameron agreed that the gist of what Mr. Walker said to her was that she was an owner of a vehicle and not a union member, and that the company felt its first obligation was now to the union members.

9. Evidence was also given before the Board by Mr. Peter Selfi, a dependent contractor employed by the respondent, and currently the union steward. He testified that if

anything there was more work available from the respondent from the end of March to the date of the hearing in early June of 1980 than during the same period the previous year, and did not see any reason why the work could not be shared by ten trucks instead of eight, as in the past. He conceded in cross-examination, however, that he knew that business was slow during his absence in February and March, and also that a full day of runs (which would be about ten loads) was not generally available during the month of May. In other respects, Mr. Selfi confirmed the evidence of Mr. Reynolds. He testified that Danny Fast, for example, had always been used by the respondent to take an occasional load which had to go out when one of Danny Fast's trucks was sitting in the respondent's yard, and further indicated that from what he had seen Danny Fast had in fact been used less in the present year than the preceding year. He also confirmed that the bulk of the excess loads, when they did arise now, were being handled by the contractors who regularly serviced Walker Brothers at its Vineland and Ridgemount quarries. Mr. Howard Stockard, Mr. Cameron's driver, also testified before the Board, and simply confirmed Mr. Cameron's intention to take over the driving of his own vehicle.

10. The final evidence on behalf of the complainant was given by Mr. Maurice Dumontel, its business agent. Mr. Dumontel testified that he was present at the meeting at which the previous section 79 complaint was settled, and at the end of it he asked the respondent if Mr. Cameron's trucks were also going back to work. He was told that they were (although Mr. Reynolds denies this). Mr. Dumontel indicated to the Board that if he had known that Mr. Cameron was going to be laid off because of the bargaining unit, the complainant might have been able to facilitate matters. Mr. Dumontel went on to testify that the complainant at the time was engaged in a drive to organize employees and dependent contractors throughout the Regional Municipality of Niagara, and that the "termination" of Mr. Cameron by the respondent has marked a chilling in the complainant's campaign. Mr. Dumontel was of the opinion that the complainant's apparent inability to protect the job of Mr. Cameron has raised doubts about the ability of the complainant, which is a new trade union, to protect the jobs of others who might have been inclined to assist or co-operate in the organizing campaign.

11. Since the parties were agreed that, as of the date of his lay-off, the grievor was not an "employee" within the meaning of *The Labour Relations Act*, the respondent took the position that the Board was without jurisdiction to entertain the present complaint, relying essentially on the *Barbara Jarvis* case (*Jarvis v. Associated Medical Services Ltd. et al.* (1964), 44 D.L.R. (2d) 407 (S.C.C.), affirming 35 D.L.R. (2d) 375). In response, the complainant asserted that the Board did in fact have jurisdiction, on the grounds, firstly, that the grievor was a person "seeking to become an employee" within the meaning of section 58 of the Act and, in particular, the words of Aylesworth, J., in *Associated Medical Services, supra*, and secondly, on the grounds that the lay-off of the grievor, because of its chilling effect on the complainant's organizing campaign, was a wrong done to the complainant itself, and for which the Board can provide relief.

12. With respect to the first ground put forth by the complainant, the evidence is somewhat equivocal as to the precise basis on which the grievor was seeking re-employment by the respondent, as well as to the extent of the respondent's awareness of any change in the grievor's "non-employee" status. The complaint itself seeks reinstatement to the grievor's "former position". The grievor's request to the respondent for re-employment was, however, clearly referable to the existing bargaining unit which both parties had agreed was composed

of “dependent” contractors, and the Board has little difficulty characterizing the grievor’s request as simply one of being included in the bargaining unit and sharing in the available work with the other dependent contractors. That was the specific relief sought by complainant’s counsel at the hearing. It was the employment of another driver by the grievor which caused the complainant and the grievor to consider him prior to his lay-off to be ineligible for membership in the union or the bargaining unit (pursuant to the Board’s decision in *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806). In laying off his driver, the grievor clearly considered himself to be thereby removing the legal impediment to his entry into the bargaining unit, which, again, the parties had agreed (and the Board’s certification had determined) was composed of “dependent contractors”, or “employees” with the meaning of *The Labour Relations Act*. It cannot be disputed, therefore, that the grievor was at that point “seeking to become an employee” of the respondent, and that the respondent was, conversely, refusing to employ him. The situation thus appears to the Board to fall squarely within the words of section 58(a) of *The Labour Relations Act*, which provides:

“58. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

(a) *shall refuse to employ or to continue to employ a person, ... because the person was or is a member of a trade union or was or is exercising any other rights under this Act;*” [emphasis added],

as well as within the words of Aylesworth, J. A., in *Associated Medical Services*, *supra*, where his Lordship, at page 380, indicates that the words of [now] section 58 are to be confined to “employees” and persons “seeking to become an employee”. (The Supreme Court of Canada affirmed the reasoning of Aylesworth, J. A. in upholding the Court of Appeal’s decision.)

13. A similar issue concerning this Board’s jurisdiction arose in the recently-decided case of *Angelo Mallozzi and Dominion Bridge Company Limited*, Board File No. 0102-79-U, released July 9, 1980. There the complainant Mallozzi had been promoted out of the bargaining unit, in which he had been active on behalf of the incumbent trade union, to the position of foreman. After some fifteen months, the respondent employer notified him that his employment was being terminated. Mr. Mallozzi then requested that he be returned to the bargaining unit. The request was denied, and Mr. Mallozzi filed a complaint under section 79 of *The Labour Relations Act*, alleging that that refusal was a violation of section 58(a) of *The Labour Relations Act*. In dealing with its jurisdiction to hear the complaint, the Board, after a careful analysis of the jurisprudence following the *Jarvis* case, concluded as follows:

“15. Section 58 of the Act makes it an offence to continue to employ a person (who is already an employee for purposes of this Act) and to refuse to employ a person who is seeking to become an employee for anti-union reasons. The reasoning of the Court of Appeal in the *Barbara Jarvis* case as adopted by the Supreme Court bears repeating. In reference to the meaning of the word ‘person’ in section 50 (now section 58) the Court held:

‘To employ or continue to employ a person is for the purposes of the Act, to cause a person to become an employee or to continue a

person as an employee. The section refers to two classes of individuals – a person who seeks employment, i.e. who seeks to become an employee and a person who already is an employee. This meaning of the word is quite in keeping with the general object and purpose of the Act; on the other hand it is neither logical nor necessary to construe 'person' as it appears in the section as applying to anyone other than an individual seeking to become an employee or who already is an employee and we are told in plain terms by sec. 1(3)(b) of the Act that someone working in a managerial capacity is not, for the purposes of the Act to be considered an employee.'

A person exercising managerial authority within section 1(3)(b) of the Act is without a substantive right under section 58 to challenge his removal from a supervisory position. In our view, however, once the decision has been made to remove the employee from the managerial position he holds he is no longer employed in a managerial capacity within the meaning of section 1(3)(b) of the Act. Can it be said, therefore, that when he requests a return to the bargaining unit (having been promoted from the bargaining unit) he is in a lesser position vis-a-vis the protections afforded under section 58 than a person who applies off the street? We think not.

16. It is clear on a reading of the judgment of the Supreme Court in *Barbara Jarvis, supra*, and the subsequent decisions of the Board that the restrictive interpretation given the word 'person' in section 58 and section 61 is designed to preserve the integrity of the collective bargaining process as an exercise engaged in by employees represented by trade unions on one side and employers, in the person of those exercising managerial function, on the other. A managerial employee has no right under the Act to compel his continuation in employment as a managerial employee. While the Supreme Court has made it clear that a managerial employee cannot compel his continuation in employment as a managerial employee, a reading of the court's decision in *Barbara Jarvis, supra*, makes it equally clear in our view that a person who no longer exercises managerial function is entitled to the protections of section 58 in respect of any attempt to secure employment within the bargaining unit following an employer's decision to remove him from his managerial position. The considerations upon which the restrictive interpretation relied upon by the respondent is based, do not prevail in respect of a person who has been removed from a managerial position and claims that a subsequent refusal of the company to return him to the bargaining unit is in violation of the Act. Regardless of the bona fides of the employer's original decision to promote the employee, the employer, having decided to remove the employee from his managerial position, cannot discriminate in respect of a refusal to return the employee to the bargaining unit. On a reading of section 58(a) of the statute as interpreted in *Barbara Jarvis, supra*, such a person is clearly a person seeking to become an employee within the meaning of the Act and is therefore covered

by the protections extended by the section 58(a) prohibition against refusing to employ a person for anti-union reasons.”

Similarly, the Board finds that it has the jurisdiction to entertain the present complaint, on the ground that the grievor Ian Cameron, although previously having the status of “employer”, was subsequently “seeking to become an employee” of the respondent.

14. Turning to the merits of the present complaint the Board finds the evidence supportive of the respondent’s position that in view of the limited amount of work available, the respondent has not been disposed to increase the complement of dependent contractors contained in the bargaining unit. While, as Mr. Selfi indicated, the respondent could have reverted to a sharing of the work amongst ten rather than eight trucks, there was no requirement that it do so, and for its own reasons the respondent has chosen not to. In the absence of evidence of a clear abundance of work, or the hiring of other dependent contractors in preference to the grievor, the Board is inclined to accept those reasons (even though offered to the Board second-hand) as being devoid of any anti-union *animus*, noting as well that the respondent has already been organized and a collective agreement signed. Nor does the Board find it unreasonable, in the sense of being unworthy of belief, that the respondent would opt to have surpluses of work, intermittent as they now are, performed by owner-operators who continue to be regularly employed by it at Ridgemount and Vineland, rather than by an outside contractor, including (now) the grievor Mr. Cameron. The evidence further establishes that no outside contractors have been utilized by the respondent since Mr. Cameron’s lay-off beyond those who station trucks at the respondent’s quarry for the purpose of picking up materials of their own, and that even the occasional use of these has declined.

15. We do not find, therefore, that the decision not to hire Mr. Cameron into the bargaining unit was made as a result of his activities on behalf of the Niagara Region Haulers’ Association. Even if our findings were otherwise, however, this complaint would fail, relying as it does on sections 56 and 61 of the Act. Section 61 would appear to have no application to the present case, and was not really argued. Section 58, again, provides:

“58. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

- (a) shall refuse to employ... a person... because the person was or is a member of a trade union or was or is exercising any other rights under this Act...”

No evidence was given as to the grievor’s activities on behalf of or in respect to the complainant (as opposed to the Niagara Region Haulers’ Association) and, as noted, the respondent had already been successfully organized by the time of the grievor’s lay-off. The complainant, rather has clearly been relying throughout the proceedings on the grievor’s activities as “business agent” for the Niagara Region Haulers’ Association. It is admitted, however, that that Association was not a “trade union” within the meaning of *The Labour Relations Act*, and accordingly, whatever else the grievor was doing, it cannot be said that he ever “was or is exercising any... rights under this Act”. Absent such conditions, there would appear to be nothing in the Act to otherwise restrict the right of the employer to hire whom it chooses. It may well be that the grievor had significantly diminished his popularity with management

through his activities on behalf of the earlier Association, but unless such activities fall within the range of those "protected" by the Act, the Act affords no relief to the complainant.

16. Finally, the Board is not persuaded that section 56 of *The Labour Relations Act* would entitle the complainant to seek a remedy for the grievor on its own behalf in the present case. That section provides:

"56. No employer, employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

In *A.A.S. Telecommunications Ltd.*, [1976] OLRB Rep. Dec. 751, the Board found that the discharge of a member of management was intended to, and did, have the effect of chilling a trade union's organizing campaign with respect to employees of that employer. The Board found that this was unlawful interference with the selection or representation by employees of a trade union, within the meaning of section 56, and ordered the management person to be reinstated to a position within the bargaining unit. The Board in the present case need not decide whether the relief afforded through section 56 would go so far as to require the reinstatement of an individual by an employer having no employment relationship with the employees whose rights have allegedly been interfered with. A reading of section 56 in its entirety, as well as in the context of the other unfair labour-practice sections of the Act, leaves no doubt that the "interference" prescribed by section 56, to be wrongful, requires at the least an element of anti-union *animus*, which the Board has found to be lacking in the present case. In other words, mere "interference" in the broadest sense, even if established, is not sufficient to create a violation of the statute, and counsel for the complainant did not argue that it was. To hold otherwise would, for example, suddenly render unlawful various forms of employer restrictions upon union activity during working hours, including those normally contained in collective agreements, and destroy the very balance which the section appears to be attempting to strike. See, for example, *A. N. Shaw Restoration Ltd.*, [1976] OLRB Rep. Sept. 504.

17. For the foregoing reasons, this complaint is dismissed.

0863-79-M International Union of Operating Engineers, Local 793,
Applicant, v. Employer Bargaining Agency and **Williams Contracting Ltd.,** Respondents.

Collective Agreement – Construction Industry – Employer bound by excavation agreement – Seeking to be bound by roads agreement – Whether joining employer association sufficient to become bound by agreement – Operation of section 44 considered

BEFORE: George W. Adams, Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

APPEARANCES: *S. B. D. Wahl and E. A. Ford for the applicant and W. J. McNaughton and W. Kutynec for the respondents.*

DECISION OF THE BOARD; July 8, 1980

1. This matter involves the referral of a grievance to arbitration under section 112a of *The Labour Relations Act*.

2. The grievance dated June 11, 1979 is described as a union grievance claiming a violation of a collective agreement between the Operating Engineers Employers Association (including the Toronto and District Excavators Association) and the grieving trade union, the International Union of Operating Engineers, Local 793. The grievance describes the project sites as: a) "Comsumers Glass Project – 100 Chesholm Dr – Milton, Ontario", b) "Renforth Dr and Eringate Dr – Etobicoke, Ontario"; it alleges violations of both the Master Portion of the agreement (Articles 3, 15, 16, 21, and 24) and Schedule D (Articles 1, 3, 5, and 6); and describes the relevant time period as "May 13, 1979 and continuing." The nature of the grievance and the remedy requested are set out in the following form.

- "1. The Employer is employing non-union personnel to perform work covered under the Collective Agreement.
2. The Employer has failed or refused to pay the proper rate of wages as set out in the Collective Agreement.
3. The Employer has failed or refused to pay overtime rates, travel allowance and reporting allowance as set out in the Collective Agreement.
4. The Employer has failed or refused to remit Pension and Employer Labour Relations Fund contributions at the proper rate and further the Employer has failed or refused to deduct and submit Working Dues at the proper rate.

REMEDY REQUESTED

1. That the Employer immediately replace all non-union personnel with members of the Union and further, that the Employer pay in trust to I.U.O.E. Local 793, all monetary conditions as outlined in

the Collective Agreement for all hours earned by non-union personnel.

2. & 3. That the Employer immediately pay to all employees concerned all monies owing for wages, overtime rates, travelling and reporting allowance in accordance with the Collective Agreement.
4. That the Employer immediately correct all Working Dues, Pension Fund and Employer Labour Relations Fund contributions in accordance with the Collective Agreement."

3. The respondent filed a reply to the referral denying the grievance and stating that "it has performed all the work in accordance with the terms of an agreement between the applicant and the Metropolitan Toronto Road Builders' Association, which agreement is binding on the respondent, Williams Contracting."

4. This referral was filed with the Board on August 9, 1979. A hearing was scheduled for August 24, 1979 but was adjourned *sine die* on the consent of the parties. The matter came on again for hearing on November 5, 1979 and before a panel of the Board differently constituted than this panel. At the time of that hearing the Board was in receipt of a letter from counsel to the Operating Engineer Employers Bargaining Agency advising that, although the Agency had been named as a respondent, it did not intend to take part in the proceedings. From a reading of the decision of that panel dated January 3, 1980, [1980] OLRB Rep. Jan. 121, it is apparent that the respondent company, Williams Contracting Ltd., raised a number of preliminary objections to the Board proceeding on November 5, 1979. It first argued that the referral did not clearly raise the nature of the grievance and that the decision of the employer bargaining agency not to participate may, therefore, have been misinformed. The Board rejected this argument at paragraph 3 of its decision in writing:

"Since the employer association had, in fact, received proper notice of the November 5th hearing and had chosen not to attend, the Board was not prepared to accede to counsel's request for a further adjournment. Apart altogether from the fact that both named respondents were represented by the same firm of solicitors, the Form 7 notice specifically warns that if a party fails to attend at the hearing, the Board may proceed in its absence."

The respondent company's second preliminary objection was based on a submission that its defence necessitated giving notice to certain other parties who might be affected by the Board's decision. This defense is revealed in its reply wherein it alleges to be bound to another collective agreement with the applicant (the Metropolitan Toronto Road Builders' Association agreement) and which agreement it has honoured during the period relevant to the grievance. It was the respondent's position that the Board's decision on the availability of this defense could affect both the employers and the association party to this other collective agreement and, possibly, certain other trade unions representing the employees of these employers. However, paragraph 4 of the Board's decision of January 3, 1980 records the admission that none of these entities were parties to, or bound by, the agreement on which this grievance is based nor, in the case of the allegedly interested trade unions, was it alleged that they represented any of the employees covered by this collective agreement. The Board also

noted in its January 3rd decision that the respondent company did not file its reply indicating the possible interest of these other entities until the very day of the hearing and that it had made no effort to provide notice to these allegedly interested persons and organizations.

5. In the circumstances, the other panel of the Board decided to hear evidence in respect of this second preliminary objection following which it rendered its written decision of January 3, 1980 holding that it was unnecessary to adjourn to give notice to these other persons as the respondent had requested. An application for reconsideration was dismissed by decision dated February 25, 1980. The principal reasoning of the Board's decision of January 3, 1980 on the issue of the adequacy of notice is found at paragraph 12 which reads:

"We accept the respondent's contention that collective bargaining relationships in the construction industry are interrelated and that employers and trade unions will be interested in, and perhaps affected by, the negotiation or interpretation of collective agreements other than those to which they are immediate parties. However, we do not accept that such "third parties" are entitled, as of right, to intervene in proceedings under section 112a, (see: *Napev Construction Ltd.*, [1976] OLRB Rep. Mar. 109; application for judicial review dismissed *sub nomine*; *Bricklayers, Masons, Independent Union of Canada, Local 1 v. Ontario Labour Relations Board*—decision released May 18, 1977—unreported) nor do we think the Board should readily exercise its discretion to add them, simply because they *may* have a commercial interest in the outcome of the proceeding. If strangers to the agreement were entitled to participate, the speed and economy which section 112a was designed to achieve would be seriously undermined, and the procedure needlessly complicated by the intervention of parties who are neither directly affected, nor bound by the legal result. Of course, nothing prevents an immediate party to a collective agreement from adducing legally admissible evidence of other bargaining relationships where such evidence would be helpful in resolving an ambiguity in the collective agreement in question. Moreover, the existence of an ongoing, quasi-contractual proceeding under section 112a does not prevent a third party from asserting statutory rights available under other sections (for example, section 81 respecting jurisdictional disputes, section 135 respecting sectoral determinations). In appropriate circumstances the Board may consolidate such proceedings with the 112a proceeding or adjourn the 112a proceeding until more general questions have been resolved. (See, for example: *Napev Construction Ltd. No. 2*, Board File No. 0534-79-M, decision released Sept. 17, 1979—as yet unreported.) In our view these avenues are sufficient to protect third party interests and it is unnecessary to encumber a section 112a proceeding with numerous interveners in the same interest as the parties already before the Board. There may well be circumstances in which a section 112a proceeding raises questions of general interest to the industrial relations community and in those cases the Board might well wish to entertain *amicus curiae* submissions; however we are not satisfied such circumstances exist in the present case. Accordingly, the Board is satisfied that it is unnecessary to adjourn to

give notice to other parties and the Registrar is, therefore, directed to relist the matter for a continuation of the hearing on the merits."

6. Unfortunately, the Board did adjourn to render this decision and before the matter could be continued on its merits or rescheduled by the Registrar, the respondent company served the Board and the applicant with a notice of judicial review together with a notice of motion wherein it sought a stay of the Board's proceedings. However, before the latter matter was heard by the Court, the respondent company decided against seeking an order staying the Board's proceedings and instead agreed to participate in such proceedings as rescheduled but without prejudice to its right to seek judicial review of the Board's ultimate decision in addition to the earlier decisions referred to above.

7. It is against this background that the applicant objected to the constitution of the instant panel because it is composed of members of the Board who did not render the Board's decision of January 3 and February 25, 1980. The applicant further contended that, in any event, a number of issues relating to the respondent's defense had already been determined against the respondent by the Board's decision of January 3, 1980 and that, therefore, such issues were *res judicata* before this panel. We are unable to accept either the objection of the applicant to the composition of this panel or its submission based on the doctrine of *res judicata*. In our view, it was unnecessary for the earlier panel of the Board to hear any evidence on the preliminary point that was before it. That panel of the Board was faced with a grievance under a particular collective agreement and any decision of the Board in respect of any defense the respondent company wished to raise would not affect the legal interests of persons not parties to that agreement. At best, such persons or organizations could only be incidentally or commercially affected to use the jargon of the cases relied upon by the Board in its decision of January 3, 1980. It may have been that the availability of such persons was important to the respondent in establishing its defense, but the respondent could achieve their attendance through the exercise of the Board's subpoena power. Accordingly, it was unnecessary for the Board to hear any evidence on the issue of notice or any of the other observations that it did and which impinged on the merits of the grievance. We are of the opinion that it would be unfair to the respondent, having had its preliminary point rejected and which rejection did not require the adduction of evidence, to be burdened by unnecessary and collateral findings of the earlier panel in now defending against the merits of the grievance. Had the respondent not been required or invited to tender evidence on its preliminary objections, the applicant would have been required to proceed with its case and the evidence it adduced would have been available to the respondent and the Board in assessing the respondent's defense. Indeed, some of the points determined against the respondent by the other panel of the Board which related to its defense appear to have been based on a finding of insufficient evidence and, yet, had the case proceeded in the normal way, the respondent would have been under no obligation to adduce evidence on these points until the applicant had put in its case on the merits. For all of these reasons, we do not think this is a proper case for the application of an approach analogous to *res judicata*. While the principle is an important one in proceedings before the Ontario Labour Relations Board, the Board is not obligated to apply it thoughtlessly and this is particularly the case where an apparent unfairness would be worked. See *Wright Assemblies Ltd.*, 61 CLLC ¶16,215. Alternatively, we are prepared to reconsider the decisions of the earlier panel based on the evidence adduced before us and the applicant was advised of this possibility at the outset of the hearing. Accordingly, the panel affirms only that decision of the earlier panel holding that the initial notices of the Board to the two-named respondents were

adequate. We reserved our decision on the applicant's submission that the doctrine of *res judicata* was applicable and required the applicant and the respondent to put in all of their evidence on the merits of the grievance irrespective of the findings of the earlier panel. The remainder of our decision, therefore, reviews this evidence and our related findings.

8. The applicant trade union has had bargaining rights for employees of the respondent company coming within its jurisdiction for a considerable period of time. This relationship was documented by the filing of Board Decision File No. 488-71-R (and certificate) in which the respondent was among the employers for whom a certificate of accreditation was issued to The General Contractors' Section of the Toronto Construction Association with respect to the applicant trade union. Two of the interveners in that matter were the Toronto and District Excavators Association ("the excavators association") and The Metropolitan Toronto Road Builders' Association ("the roadbuilders' association"). The evidence establishes that the respondent company was a member of the former association (the excavators' association) as early as August 1, 1973 and was bound by a collective agreement between that association and the applicant trade union executed on August 23, 1973. It is instructive to examine a few provisions of this earlier agreement to gain a flavour of the bargaining relationship at that time. They include:

"ARTICLE 2 - RECOGNITION

2.1 The Employer recognizes the International Union of Operating Engineers, Local Union No. 793, as the sole and exclusive bargaining agent for all employees coming within the jurisdiction of the International Union of Operating Engineers.

ARTICLE 4 - CRAFT JURISDICTION

4.1 The jurisdiction of this agreement shall be the operating, repairs, maintenance or servicing of all equipment as set out in Article 15 of this agreement.

ARTICLE 5 - GEOGRAPHICAL AREA

5.1 This agreement shall be effective within Metropolitan Toronto, the Counties of York and Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario. (Labour Board Area #8).

ARTICLE 15 - WAGES AND CLASSIFICATIONS

	July 18 1973	Nov. 1 1973	May 1 1974	Nov. 1 1974	May 1 1975	Nov. 1 1975
CLASS 1	\$	\$	\$	\$	\$	\$
Engineers operating shovels, backhoes, hoppers, drag-lines,	7.60	7.80	8.15	8.35	8.75	9.05

	July 18 1973	Nov. 1 1973	May 1 1974	Nov. 1 1974	May 1 1975	Nov. 1 1975
<i>CLASS 1</i>	\$	\$	\$	\$	\$	\$

gradalls, cranes
and similar equip-
ment, heavy duty
mechanics.

CLASS 2

Welders	7.45	7.65	8.00	8.20	8.60	8.90
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CLASS 3

Operators of bull- dozers, tractors, scrapers, emcos, graders, overhead loaders, front-end loaders, indus- trial tractors with excavating attachments, compressor operators.	7.10	7.30	7.65	7.85	8.25	8.55
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CLASS 4

Oiler-grademen and oiler-drivers, mechanics hel- pers and service- men.	6.20	6.40	6.75	6.95	7.35	7.65
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a) When engineers are required to operate equipment of a lesser rate, they shall maintain their established rate.

b) Equipment in Classification 1 shall be manned by an Engineer and oiler-grademan, or oiler-driver. This shall not be abused by either party.

c) Other types of equipment or classifications under the jurisdiction of the International Union of Operating Engineers, not appearing in this wage schedule, shall be classified as per appropriate rates, under the recognition of such classifications listed in the agreement between the Toronto Construction Association and the Union."

A successor agreement with the appropriate membership list of the excavators' association bearing the respondent's corporate name was introduced and was for the period May 1, 1976

to April 30, 1978. It can be noted that these agreements, on their face, applied to all sectors of the construction industry for the equipment and classification listed.

9. On March 31, 1978, the Minister of Labour designated the Operating Engineers Employers Agency, consisting of The Canadian Association of Foundation Specialists, Crane Rental Association of Ontario, Industrial Contractors Association of Canada, Labour Relations Bureau of Ontario General Contractors Association, Ontario Erectors Association, Ottawa Crane Rental Association, *Toronto and District Excavators Association* and Heavy Equipment Services Section of the Windsor Construction Association, as the employer bargaining agency to represent in bargaining all employers whose employees were represented by 1) the International Union of Operating Engineers; 2) *Local Union 793*; and 3) any other local union of the International Union of Operating Engineers as specified (our emphasis). This designation, of course, related only to employees of the employers subject to collective agreements, certificates and voluntary recognition agreements as those agreements and certificates pertained to the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario ("the ICI sector"). Accordingly, the respondent company being a member of the excavators association and being an employer whose employees were represented by the applicant union became subject to this designation for the ICI sector. The evidence establishes that the designation order for the ICI sector and the multi-sector bargaining relationship of the applicant and the excavators association were accommodated by the entering into of a composite collective agreement between the employer bargaining agency, the excavators association and the applicant trade union dated July 17, 1978 and having a term of June 19, 1978 to April 30, 1980. This being the agreement or agreements under which this grievance is referred, a number of its provisions are worthy of mention. They include:

"ARTICLE 2 – RECOGNITION

- 2.1 The Employer recognizes the Union as the exclusive bargaining agent for all employees of the Employer for whom the Union has bargaining rights engaged in work covered by the schedules and classifications set out in this agreement, and any additional classifications as may be agreed to by the parties.

ARTICLE 11 – PAYMENT OF WAGES AND LAY-OFF

- 11.1 b) Accompanying each payment of wages shall be a retainable statement identifying both the Employer and the employee, showing the pay period, total hours marked "regular" and "overtime", the hourly rate, the total earnings, the amount of vacation pay, the amount and purpose of each deduction, and the net earnings. (Where the Employer does not presently show all of this information he will be given until January 1, 1979 to comply).

ARTICLE 15 – HOURS OF WORK

- 15.1 Eight (8) hours shall constitute a day shift except as noted herein, the said regularly assigned hours to be from 8:00 a.m. to

5:40 p.m., with a one-half hour lunch period without pay. The starting time and the quitting time may be varied up to one hour by agreement between the Union and the Employer. Such agreement shall not be unreasonably withheld.

15.2 *Site Preparation, Sewer and Watermains*

- a) Site preparation shall mean the excavating of ground to sub-grade level and shall include pile driving, drilling, boring, dockwork, tunnel work or underground services.
- b) The standard work week shall be forty-five (45) hours from Monday to Friday inclusive. The standard work day shall not be more than nine (9) hours per day at straight time between 7:00 a.m. and 6:00 p.m.

ARTICLE 26

The parties agree that Appendix "A" and Schedules "A" to "O" attached hereto are incorporated into and form part of this Collective Agreement."

We note that following Article 26 the agreement is executed by the employer bargaining agency and each constituent employer association including the Toronto and District Excavators Association.

10. Schedule "A" is said to apply to employers engaged in the "Crane and Equipment Rental Business" within the Province and, as in all the schedules, the classifications, wages, and other terms and conditions of employment peculiar to that activity are set out in detail therein. Schedule "B" applies to employers in the "Steel Erection or Mechanical Installation Business" within the Province. Schedule "C" pertains to employers engaged in the "Foundation, Piling and Caisson Boring Business" within the Province. The schedule under which this grievance is filed is Scheduled "D" which is described as applying to "Employers that are member Companies of the Toronto & District Excavators Association engaged in the EXCAVATING BUSINESS within Labour Board Area #8." Schedule "E" applies to employers engaged in all work other than the work covered by Schedules "A", "B", "C" and "D" and "without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within the Counties of Essex and Kent." Schedule "F" is the same as "E" but for the County of Lambton. The remaining schedules are similar in description to Schedule "E" but for other geographic areas as set out. The most important of these schedules for the purposes of this grievance is Schedule "J" described as applying to:

"... Employers engaged in and work other than the work covered by Schedules "A", "B", "C" and "D" hereof and without limiting the generality of the foregoing BUILDING AND CONSTRUCTION WORK within Metropolitan Toronto, the Regional Municipalities of Peel, York, Durham, the Counties of Simcoe, Muskoka, Victoria, Haliburton, Peterborough and that portion of Northumberland lying West of a line running north from Colbourne to McCrackens Landing and that portion of the Regional Municipality of Halton lying East of #25 Highway."

11. Key provisions of Schedule "D" include:

"ARTICLE 1 – CLASSIFICATIONS AND WAGES

- 1.3 Operators of bulldozers, tractors, scrapers, emcos, graders, over-head, loaders, front-end loaders, industrial tractors with excavating attachments, compressor operators.

June 19, 1978	\$ 10.72	1.07	.30	.10	12.19
May 1, 1979	11.13	1.11	.30	.30	12.84

- 1.7 Other types of equipment or classifications under the jurisdiction of the International Union of Operating Engineers, not appearing in this wage schedule, shall be classified as per appropriate rates, under the recognition of such classifications listed in Schedule "J".

ARTICLE 3 – OVERTIME

- 3.1 All time worked by an employee before or after his regular shift on Monday to Friday inclusive as provided for in Article 15.2 of the Master Portion of this agreement and all hours worked on Saturday and Sunday shall be considered overtime and paid for as follows:"

And these Schedule "D" rates should be contrasted to the higher wage rates stipulated in Schedule "J" for the same work (See Schedule J, Article 1.4).

12. Mr. William White, Manager of the Toronto and District Excavators Association testified. He confirmed the membership of the respondent company in his association and that the respondent had changed its corporate name from William Exavating Limited to Williams Contracting some four to five years ago. He indicated that in the early 1970's the respondent sold his backhoes and loading equipment, retaining only scrapers and bulldozers. He identified Exhibit 12 as the list of employers who were members of the Association on whose behalf the Association was bargaining at the advent of province-wide single trade bargaining under Bill 22. He testified that excavation work under Schedule D is considered site preparation within the meaning of Article 15.2 of the master portion of the provincial agreement, a fact confirmed by Article 3.1 of Schedule D. He testified that the wage rates in Schedule D applied to all sectors in Board area #8 other than the electrical power systems sector and the pipeline sector. These rates, the Board was advised, represented a "mid-range" of rates for all sectors to avoid having to compute a different rate of pay each time the employee worked in a different sector (a situation which could occur many times in a single day). He testified that this schedule therefore applied to the members of his Association whether they were digging a hole in the ICI sector or setting a sub-grade for a commercial or residential subdivision or railway siding.

13. On cross-examination, he admitted that a few members of his Association were also members of The Metropolitan Toronto Road Builders' Association and were parties to that association's agreement with the applicant trade union. These contractors, he said, had a choice over which collective agreement to apply when bidding a roadbuilding job and that, because the "roadbuilders" rates were lower than the excavator rates, White had spoken to the union about the potential unfairness of the situation to members of his association who did

not have access to the two agreements. However, he went on to say that those of his members who were also party to the roadbuilders agreement were "prime" contractors and by prime contractor he meant a contractor responsible for the whole of a roadbuilding contract. Such a contract could include the excavating of the grade to subgrade, the spreading of aggregate, the setting of concrete curbing, and the laying of asphalt sewers and culverts. However, a prime or general contractor might set the subgrade according to the plan and then sub-contract the moving of earth and other obstacles to an excavator contractor or specialty contractor like the respondent company.

14. Finally, White testified that access to the excavators' agreement depended on the consent of both the association and the applicant trade union. He said a contractor would first apply to the Association for membership and enclose an initiation cheque. The application is then presented to the Association's board of directors and, if approved, the trade union is notified. On being notified, it is then up to the trade union to determine whether the excavating agreement will apply to that contractor or not. He said the only time he would hear from the union is when it did not accept a particular contractor. When the trade union has refused in the past, the Association was told the reasons for the refusal.

15. Mr. Ford, Labour Relations Manager for the applicant trade union, testified. His evidence was consistent with Mr. White's understanding of the provincial agreement's purpose (i.e. the mid-range rates of Schedule D). He said that, as a general matter, the payment to employees does not depend so much on what the employees are doing as it does on which collective agreement is applicable. He testified that a contractor's access to either the excavation or the roadbuilding agreement depended on that contractor joining the respective association *and* on the consent of the applicant trade union. Examples of contractors joining the excavators association during the currency of the collective agreement were documented in the form of two "pick-up" agreements for Colosimo Bros. Excavating and Serit Construction Ltd., respectively (Exhibits 15 and 16). Also adduced through Mr. Ford were employee deduction forms for a number of the respondent's employees indicating that until December 1978 the respondent paid employees and made deductions in accord with Schedule D of the provincial agreement. However, the forms show that beginning in January 1979 the respondent paid its employees and made deductions in a way that appears to accord with the roadbuilders agreement, although after the filing of the grievance the pattern of deductions is less clear. Ford testified that the applicant trade union had only one collective agreement with the respondent and that was the excavating agreement (i.e. Schedule D). He specifically denied having ever executed a "roadbuilder style" agreement with the respondent and he denied that the Metropolitan Toronto Road Builders' Association agreement applied to the respondent.

16. The roadbuilders agreement was executed on July 28, 1978 and a list of members of the roadbuilders association furnished to the applicant union over the signature of S. E. Dinsdale by letter dated August 10, 1978 did not include the respondent company. Also filed with the Board was a list of members dated October 22, 1976. When the two lists are compared, a number of changes are apparent and Mr. Ford was cross-examined on each of these variances. One change involving Dufferin Materials and Construction Ltd., appears to be the result of a change in business name and location. Ferpac Paving Inc. was added in 1978 and was explained as an "off shoot" of Ferman Paving Limited, a company on both lists. Ontario Paving Company was added in 1978 but Ford testified that the union had an "independent" agreement with it for the roadbuilding industry. Ford stated that he knew of no company being added to the 1978 list which did not already have an agreement for roadbuilding with the ap-

plicant union. He pointed out that this had also been the case for Pave-Al Limited and Ventrella Bros. Construction Ltd. when these two companies were added to the 1976 list. Correspondence dated August 1976 was filed with the Board and indicated that the union had specifically accepted the application of the roadbuilders agreement to Prospect Paving Limited, King Town Paving Company, John Cucci Limited and Repac Construction and Materials Limited. Also filed with the Board was a "pick-up" agreement executed by Ferpac Paving Inc. dated May 30, 1977. A somewhat similar agreement dated January 20, 1975 executed by the union and Pave-Al Ltd. was filed as well. It was Ford's evidence that any new member of the association who did not already have a roadbuilding agreement with the union would have signed a pick-up agreement with the union as Ferpac and Pave-Al did.

17. On cross-examination, Ford acknowledged familiarity with the following letter dated May 4, 1979 sent to the union by Mr. Dinsdale and advising that the respondent company was now a member of the association.

"Re: The Metropolitan Toronto Road Builders' Association, and Re: International Union of Operating Engineers

Please be advised that Williams Contracting has become a Member in good standing of this Association effective January 4th, 1979 and should be added to the list of Companies to be bound to the Collective Agreement between you Union and this Association."

Ford testified that the union did not reply to this letter but that he had told William Kutynec, the president of the respondent company, that the roadbuilders' agreement was not available to him unless he became a "prime" roadbuilder.

18. Ford acknowledged that Rumble Contracting Limited was a party to both the excavating and roadbuilding agreements and that it could, therefore, choose between them when bidding a job. However, he said that it was the union's position that Rumble could not use the roadbuilding agreement unless it was acting as a prime contractor (or, in the case of another contractor, unless it was the only agreement with the union). Ford said the rationale to this approach is that the speciality contractor is able to operate under the excavating agreement regardless of the sector involved whereas the roadbuilding agreement is available to the prime roadbuilder only in the roadbuilding sector. Once the prime moves out of that sector and into the ICI or heavy engineering sectors, it has to pay the higher rates associated with the agreements for these sectors. Ford testified that the respondent is a subcontractor not a prime roadbuilding contractor and, therefore, cannot have access to the roadbuilding agreement. Ford said that if the respondent was granted access, the union would have to do the same for all other members of the excavating association and the concept of the "mid-line rate" of the excavating agreement would be rendered useless. The end result would require a different rate for each sector and a subcontractor often finds himself operating in five different sectors in a single day or week. He said speciality or subcontractors move in and out of different sectors more frequently than most other contractors do and that the mid-line rate was devised to recognize and accommodate this fact. Ford acknowledged that the excavating agreement may be a disadvantage to the sub-contractor operating in the roadbuilding sector most of the time, but stressed that it was a definite advantage to a subcontractor performing work in the ICI sector. Ford also disputed the accuracy of three letters to the respondent in 1979 emanating from the consultant group administering the employee benefit plans. It was Ford's position that the consultant group was in error and that many mistakes of this type have occurred. The

benefit plan administrators rely on lists of employees furnished by the trade union, but that errors have been made on occasion.

19. William Kutynec, president of the respondent, testified. He told the Board that since 1975 the respondent had been primarily engaged in roadbuilding through the operation of scrapers and bulldozers. As a subcontractor, the respondent's participation was usually limited to stripping the topsoil and grading the roadbed. On occasion, it might put the gravel down. He admitted that prior to 1979 the respondent worked under the excavating agreement. However, some time prior to 1979 he had lost a bid for the CN Marshaling Yards near Toronto to a roadbuilder and when hired at that location on an hourly basis by the general contractor he learned that his wage rates were higher than those of the successful contractor. On further inquiry someone told him that he should join "the roadbuilders" because they paid the same wage rates as "Alnor Earth Moving, Finlay-McLaughlin and Armbro." Kutynec testified that he subsequently joined the Ontario Roadbuilders Association (ORBA) and by a letter to Mr. Ford dated July 6, 1978 asked for "information pertaining to procedure concerning union operators when joining this Association." After this, Mr. Giles, the president of the applicant union and Mr. Hill, a business agent, dropped by Kutynec's home about another matter in the late summer of 1978 and Kutynec told Giles about his membership in the ORBA. He testified that Giles told him this was not good enough and that he would have to join the MTRBA. Thereafter, the respondent joined the MTRBA in early January of 1979. The joining of this association appears to be a very informal procedure and no application form was furnished to the Board. The union learned that the respondent had joined the association by Mr. Dinsdale's letter of May 4, 1979.

20. On cross-examination, Kutynec admitted that while Giles did not tell him he had to be a prime contractor to have access to the MTRBA agreement, this had always been Ford's position and he had had numerous discussions with Ford in this respect. Mr. Frank Giles was called by the union to rebut Kutynec's evidence about the meeting in the late summer of 1978. He agreed that a meeting had taken place but denied ever saying that the respondent could use the MTRBA wage rates. On the contrary, he said he told Kutynec that the MTRBA required you to be a prime contractor to become a member because this is what Mr. Dinsdale had told him. He also denied that Alnor, Armbro and Finlay-McLaughlin were party to the MTRBA agreement "as such." Giles testified that he told Kutynec that if he felt strongly about this issue he would have to provide evidence to Ernie Ford that he was a prime roadbuilder and "come to some kind of understanding with him." He further said that if the respondent got included on the roadbuilders' list and the trade union did not raise any objections, it would have that agreement. Finally, Giles denied ever receiving Exhibit 25. The union filed its grievance June 11, 1979 and formally objected to the respondent's name on the MTRBA membership list by letter dated March 11, 1980.

21. The parties agreed to a description of the kind of work that is the subject matter of this grievance. The Consumers Glass contract relates to a site located in Milton which is within Board Area #8. The site originally consisted of a building, parking lot, and field. Consumers Glass wanted to erect another building on the parking lot and field that would itself be surrounded by a parking lot. A railway siding was also to be installed. The grade of the existing parking lot was to be lowered to that of the new parking lot. Modern Excavating Contractors was the general contractor. Modern is a member of the Toronto and District Excavators Association. The respondent got the contract to strip the existing asphalt, to put the grade of the old parking lot to the subgrade of the new lot, and to put in the railway siding. It did this with its

scrapers and bulldozers. The asphalt was stripped and deposited where the railway siding was to go, the top soil was put to one side and earth removed in lowering the grade of the old lot to the new lot was also deposited where the siding was to be installed. Apparently, the respondent also assisted Modern in the removal of earth from the site where the new building was to go. The end result was a hole for the building, a uniform grade for the parking lot, and a three quarter mile long railway siding brought up to grade. The respondent did not have the contract for putting on the final grade. Four to six men were used in performing this work and all were paid at the MTRBA wage rates. The respondent has also performed similar work in cutting roads within residential subdivisions. The extent of grading and soil removal depends upon the topography. The more hilly the relief, the more extensive the cut must be for the road-bed. This work also includes smoothing down such hills for them to become adequate building lots. Soil removed from the road is distributed over a subdivision to assist in moderating the relief. The respondent also worked on an industrial park for Armbro, cutting the road and shaping the road banks to a desired slope. Work of a similar kind was also performed at the York Sanitation dump in 1980.

22. For the applicant it was argued that Schedule D is the “successor” agreement to the earlier Toronto and District Excavation agreements; that Schedule D applies to all relevant sectors for the purposes of this grievance, and that on the respondent president’s own admission, the respondent has violated Schedule D since the beginning of 1979. Counsel submitted the underlying basis to the excavating agreement would be destroyed if the respondent’s access to the MTRBA agreement was acknowledged by this Board. Counsel further submitted that on the basis of the facts established and on the wording of *The Labour Relations Act*, the respondent could not be a party or bound by the MTRBA agreement. The applicant referred the Board to section 1(1)(e) of *The Labour Relations Act* and *Marsland Engineering Limited* [1970] OLRB Rep. April 133; *Re Kong et al and Fan* (1974), 45 D.L.R. (3d) 293; *Hacquoil Construction Ltd.* [1963] OLRB Rep. June 143; *Foundation Company of Canada Ltd. et al* (1957), 57 CLLC ¶18,078; *Ecodyne Limited*, [1979] OLRB Rep. July 629. This subsection, it submitted, required a collective agreement to be in writing and signed by the parties. It stressed the absence of any agreement between the respondent and the applicant union providing the respondent with access to the MTRBA agreement. All the evidence relating to such access by other contractors during the term of the MTRBA agreement was associated with independent agreements between the applicant union and those contractors. Mere unilateral observation of a contract was, it submitted, insufficient to create an enforceable collective agreement. The applicant argued that section 44(4) of *The Labour Relations Act* clearly indicates that where an employer joins an employers’ association during the terms of the association’s agreement, there must be something signed by that employer and the trade union providing that the association’s agreement applies to the new employer member. In this regard the Board was referred to *MacGregor Crane Service Limited* [1979] OLRB Rep. Aug. 777. Alternatively, the applicant submitted that section 41(1) of *The Labour Relations Act* prohibits more than one collective agreement in relation to a bargaining unit of employees and that the earlier agreement in time must prevail. Authorities relied upon for this proposition were *Ontario Paving* [1977] OLRB Rep. Nov. 760; *Spring Plastering Limited* [1968] OLRB Rep. Jan. 1060; *Aquatite (1971) Limited*, Board File No. 1969-77-R dated November 21, 1978 as yet unreported. In the further alternative the applicant submitted that by virtue of section 133(2) of *The Labour Relations Act* the provincial agreement (Schedule D) was the only agreement that could apply to ICI work like the Consumers Glass site (i.e. parking lots and road being within the property line) and the roadbuilders agreement did not apply to the residential subdivision work because that work was in the residential sector of the construction industry. Finally, the applicant sub-

mitted that the respondent could not defend against the grievance on the basis of promissory estoppel. It could not because (a) no unequivocal representation or promise made to the respondent by the applicant union was made out on the evidence; (b) no evidence of detrimental reliance was adduced; (c) the applicant was seeking only a declaration and relief as to the future; (d) section 133(2) of the Act precluded the application of the doctrine to the ICI sector; and (e) to hold that the MTRBA agreement applied would create substantive contractual rights. The applicant concluded its argument by emphasizing that the Board was dealing with a continuing grievance brought by the applicant on its own behalf and on behalf of all bargaining unit employees. It therefore requested that the Board grant its declaration with respect to all past, present and future work.

23. For the respondent, it was stressed that officials of the applicant admitted that some contractors did have access to both Schedule D and MTRBA agreements. It pointed out that there was a meeting between Giles and Mr. Kutynec and that after this meeting the respondent joined the MTRBA and commenced using the wage rates under that agreement. Counsel argued that there was nothing in the MTRBA agreement limiting it to prime contractors and there was no clear and consistent practice on the method of extending the agreement to new association members. On the basis of these submissions, the counsel asked the Board to find that the respondent was a proper party to the MTRBA agreement. Alternatively, he submitted that the union was now estopped from asserting Schedule D due to the respondent's detrimental reliance on Mr. Giles' assurances in his meeting with Mr. Kutynec. Finally, counsel to the respondent argued that Schedule D could only apply to the ICI sector because the employee and employer bargaining agents only had the power of negotiation with respect to this sector.

24. Section 1(1)(e) of *The Labour Relations Act* provides:

““collective agreement” means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement;”

Sections 43(1) and (2) provide:

“(1) A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees in the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers' organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.

(2) When an employers' organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or council of trade unions is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions."

And, finally, section 44(4) reads:

"(4) Notwithstanding anything in this section, where an employer joins an employers' organization that is a party to a collective agreement with a trade union or council of trade unions and he agrees with the trade union or council of trade unions to be bound by the collective agreement between the trade union or council of trade unions and the employers' organization, the agreement ceases to be binding upon the employer and the trade union or council of trade unions at the same time as the agreement between the employers' organization and the trade union or council of trade unions ceases to be binding."

25. It is beyond dispute that the respondent company has had a collective bargaining relationship with the applicant trade union for many years and that up until January of 1979 the collective agreement between them was the provincial operating engineers agreement of which Schedule D is a part. We also are of the view that there can be no doubt over the validity of Schedule D to that provincial agreement. While it may well be that the authority of employee and employer bargaining agents is limited to the ICI sector, Schedule D is incorporated into an agreement which was executed by the applicant union together with the Toronto and District Excavators Association. Thus, Schedule D derives its efficacy for the ICI sector through the execution of the master portion of the agreement by the employer bargaining agency and its efficacy in relation to all other sectors through the endorsement of the Toronto and District Excavators Association. The evidence also establishes that at the time Schedule D was entered into, the respondent was a member of the excavators association and that association represented the respondent in bargaining for all sectors (other than the ICI sector). Moreover, the respondent lived by that agreement for the year 1978. We are also of the view that the only agreement that can be applicable to the respondent's business in the ICI sector is the provincial operating engineers agreement having regard to section 133(2) of *The Labour Relations Act*. Accordingly, the only question before the Board is whether the respondent in 1979 properly switched contractual obligations with the applicant union from the excavating agreement to the roadbuilding agreement for the roadbuilding sector. If the answer to this question is in the affirmative, the Board will have to determine whether the work in question was performed within that sector.

26. After a detailed review of the evidence adduced and the helpful submissions of counsel, we are of the unanimous view that the respondent was bound by Schedule D during 1979; that it violated the provincial operating engineers agreement and Schedule D for all

work it has purportedly performed under the MTRBA agreement; and that the applicant is entitled to the requested relief. We accept that the respondent became a member of the MTRBA in January of 1979 but this membership alone was not and is not sufficient to invoke the provisions of the MTRBA agreement. When that agreement was entered into between the association and the applicant union, the respondent company was not a member of the association. For the respondent to become bound by this agreement subsequent to its execution date, the statute and first principles of contract law require the consent of the applicant union. Moreover, we are of the view that this consent must be evidenced in writing and bear the signature of the respective parties. On the evidence adduced, we are satisfied that the applicant trade union's consent to the respondent's adoption of the MTRBA agreement was never obtained, either verbally or in writing. Mr. Kutynec did not dispute that Mr. Ford told him at all times that the MTRBA agreement was unavailable to him. Against the clear position of Mr. Ford, we think it extremely unlikely that Mr. Giles advised Mr. Kutynec that membership in the MTRBA was all he needed to obtain access to that agreement. Rather, we accept Mr. Giles' evidence that he left that event up to Mr. Kutynec and Mr. Ford "working something out" if Mr. Kutynec could satisfy Mr. Ford that he was a prime roadbuilder. While the term prime roadbuilder does not appear in the MTRBA agreement, there can be no objection to the applicant union basing its decision to enter into this agreement with other employers on its subjective understanding of the term's meaning, application and relevance. *The Labour Relations Act*, section 44(4) makes it clear that where an employer joins an employers' organization that is a party to a collective agreement, the employer must agree with the trade union that the agreement is to bind the employer and where this mutual agreement is forthcoming the extent of the obligation parallels the duration of the pre-existing collective agreement. While it is unnecessary to this case, it is also our view that consent under section 44(4) must be in writing and signed by both parties. These requirements arise from the definition of a collective agreement in section 1(1)(e) of the Act in that an agreement to be bound by a pre-existing collective agreement under section 44(4) is itself a constituent element of the collective agreement then entered into between the parties. It is our opinion that an agreement to be bound under section 44(4) is no different in practical effect than a memorandum of agreement to be bound by terms similar to a pre-existing collective agreement where the memorandum of agreement represents an adoption or incorporation by reference of all the terms of the pre-existing collective agreement. If a signed memorandum of agreement was unnecessary in such circumstances, it would then be possible to create a collective bargaining agreement by an oral exchange of promises and it is the unreliability of just such exchanges that section 1(1)(e) is designed to avoid. Indeed, this case represents a classic example of the confusion and uncertainty that would exist if such important contractual relationships could be entered into verbally.

27. We are also satisfied that there is no basis in fact for the respondent's reliance on the defense of promissory estoppel. It failed to establish, to the Board's satisfaction, a clear and unequivocal promissory representation by either Mr. Giles or Mr. Ford. It also failed to establish evidence of detrimental reliance even if the Board was of another view and a claim for damages cannot be equated with such reliance. Finally, we have grave doubts that the doctrine, in these circumstances, can have any application in the ICI sector having regard to section 133(2) and its underlying purpose.

28. Because Schedule D is a multi-sector agreement that has application to all of the forms of work the respondent has engaged in during 1979 and 1980 (to date), there is no need for the Board to determine precisely what sector each job and each aspect of each job falls into.

29. The applicant is therefore entitled to a declaration that the respondent was bound

by Schedule D at all times material to the grievance and to the related relief it requested in its grievance. The grievance refers to a time period "May 13, 1979 and continuing", but refers to two specific job sites. The respondent did not raise any sound reason why this matter should not be seen as applying to all the work the respondent has performed in 1979 and 1980 outside Schedule D from the date of the grievance up to the date of this decision. It is accepted that a "collective agreement is fundamentally different from an ordinary commercial contract", and this is particularly the case in the construction industry. See *Blouin Drywall Ltd. and United Brotherhood of Carpenters and Joiners of America* (1976), 57 D.L.R. (3d) 199 (Ont. C.A.). The parties to such agreements have ongoing relationships and a continuing violation ought to be the subject matter of one grievance. One arbitrator ought to be able to speak to the totality of the difference between the parties and provide a meaningful remedy. On the other hand, the applicant provided the Board with no compelling justification for our relief to speak to the future in the nature of *quia timet* relief. There is no evidence before the Board that the respondent will continue to avoid its obligations under the schedule now that these obligations are clear. The Board retains jurisdiction in all other issues related to remedy and the implementation of this decision.

0273-80-R International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), Applicant, v. **Willow Manufacturing Compnay Limited**, Respondent, v. Group of Employees, Objectors.

Petition – Petition circulated by committee opposing union – Documents signed on company premises during working day – Rumours circulating about possibility of plant closure – No intentional interference by employer – Whether voluntary (Inadvertently omitted from June Report)

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members T. G. Armstrong and M. J. Fenwick.

APPEARANCES: H. Carl Anderson, and Howard Powers for the applicant; J. Robert Howard, Dennis Wild and J. Milne for the respondent; Madeline Trahan for the objectors.

DECISION OF THE BOARD; June 26, 1980

1. This is an application for certification.

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4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the applica-

tion was made, were members of the applicant on May 13th, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. A statement of desire was filed with the Board in opposition to the union's application. Because of the extent of the overlap between persons who signed both a union membership card and the petition in opposition to the application, the Board would exercise its discretion under section 7(2) of the Act and order the taking of a representation vote if satisfied that the statement of desire represents the voluntary expression of the views of its signatories.

7. Madeline Trahan gave evidence concerning the origination and circulation of the statement of desire. Ms. Trahan has been employed by the respondent as a shipper for fourteen years. The respondent manufactures screw machine products. The shipping department is at one end of its one floor plant and the management offices are at the other. There is a foreman's office just outside the management offices and at least one foreman's office in the middle section. Ms. Trahan testified that in the regular course of her shipping duties, she spends a considerable amount of time in the front office and in discussions with members of management.

8. The evidence reveals that a five person Committee against the union was formed the day after the posting of the Board's Form 5 Notice to Employees which gave employees notice of the application for certification and an indication of the procedure to be followed by those wishing to object to the union's application.

9. Ms. Trahan testified that "the whole plant wanted to make a petition and didn't know how so [she] volunteered." The evidence indicates that the union's application for certification and the opposing petition were widely discussed in the days immediately following the posting of the Form 5 Notice to Employees.

10. On May 8th, the Committee met at Ms. Trahan's house and drew up the petition. On May 9th Ms. Trahan brought the petition to work. She kept it turned over on the corner of her desk and people came to sign it throughout the day from approximately 8:30 a.m. until quitting time at 2:00 p.m. Ms. Trahan testified that it was made known around the shop that if people wanted to sign the petition against the union it was available at her desk. In an attempt to avoid a suspicious line up at Ms. Trahan's desk, Committee members kept an eye on her desk to indicate to other employees when they could leave to sign the petition. The evidence indicates that people in the middle section could see her desk while those in the front of the shop had to rely on either a relay nod or some feeling of when the way was clear.

11. Ms. Trahan stated that when people came to her desk, she handed them a pen and turned the petition over, usually without talking to them. Some people who signed did not read the petition and some employees were unable to speak English. Ms. Trahan stated, for example, that Angela Freire, a fellow employee, does not speak English. Whether or not she can read English was not known to Ms. Trahan. When she came to sign the petition Ms. Trahan gave her the petition to sign but did not say anything to her. It is unclear on the evidence, therefore, whether or not she knew what she was signing. The Board has no evidence as to what if anything, any other Committee person told her regarding the contents of the petition.

12. At one point during the course of the day some employees who had signed union

cards approached Ms. Trahan to sign the petition. For some reason, which never became clear to the Board, Ms. Trahan decided to make a separate petition for those who had previously signed union cards. She asked these employees to come back after she had prepared a separate document for them. To the preamble of the first petition she added the words, "We were told it was for more money only." Ms. Trahan took time away from her work to prepare the second petition and then sought advice from another employee as to whether, in his opinion, the new wording was appropriate for those who had previously signed union cards. Although Ms. Trahan stated that she did not ask people who came to her desk whether or not they had previously signed for the union, the evidence before the Board readily establishes that, thereafter, one way or another, it was apparent to people who signed the petition that one document was for people who had previously signed membership cards and one was for those who had not.

13. Numerous witnesses were called on behalf of the union. Ms. Edith Gamboa, an employee who works on a screw machine, testified that one of the Committee members opposing the union, Ms. May Griffiths, told her that she would have to sign the petition or she would lose her job. Ms. Griffiths denied the accuracy of the evidence. Ms. Gamboa further testified that Ms. Trahan asked her to speak to those of her friends who could not speak English to tell them that they might lose their jobs if the union came in. This evidence was not denied by Ms. Trahan. Laura Quintal, another employee, also testified that stories were afloat that the plant would close down if the union was successful in its application for certification. On the basis of the evidence, the Board is satisfied that the rumours that the union could precipitate a plant shut down were circulating during the signing of the petition.

14. There is no direct evidence by which the Board would conclude that these rumours were initiated by management. Ms. Quintal, however, did testify, without contradiction, that Mr. Bill Darrah, who is both the son of Mr. Walter Darrah, a foreman, and the nephew of the owner of the plant, told her that the plant would shut down if the union came in and that the petition was with Ms. Trahan. The extent of Bill Darrah's involvement is not entirely clear. Although he was not a member of the Committee, Mr. Ron Schroeder, an employee in the screw machine department, stated that he saw Bill Darrah take a person to Ms. Trahan's desk and that that individual then signed the petition. In her testimony Ms. Trahan denied that Bill Darrah brought anyone to sign the petition. She acknowledged, though, that he might have sent people to her desk. The Board must, on the evidence, conclude that an employee closely related to management was seen as active on behalf of the petition.

15. Mr. Schroeder testified without contradiction that sometime after the petition had been sent to the Board, Alfred Hardsmen, the foreman of the automatic machines, approached him saying "I didn't see your name on the petition". He further testified that Mr. Hardsmen went on to say that he had looked for two names on the petition, Schroeder's and another's he would not reveal, and that he stated that he hadn't found either one of them.

16. The testimony reveals that after the petition had been sent to the Board, Ms. Trahan played an instrumental role in having Laura Quintal transferred to another position. Ms. Trahan stated that she saw union supporters speaking with Ms. Quintal in what was, in her opinion, a harassing manner. Ms. Quintal, however, described the encounter as nothing more than a conversation. Whatever the actual nature of the exchange, Ms. Trahan stated that she felt the union supporters were causing Ms. Quintal to fall behind in filling her job orders and therefore asked one of the foremen to have her transferred to another location. The evidence establishes that soon thereafter Walter Darrah, the foreman of the screw machines, told Ms. Quintal that she was being moved.

17. Persons seeking to rely on a petition in opposition to an application for certification bear the burden of establishing that the statement of desire indicating a change of heart is a voluntary expression. The Board has long recognized the sensitive nature of the employer/employee relationship in assessing the voluntariness of a petition which carries signatures of persons who shortly before supported the union. (See *Pigott Motors (1961) Ltd.*, 63 CLLC ¶16,264). Due to the suddenness of the change in sentiment, coupled with the responsive nature of the employer/employee relationship, the Board is watchful for indications of managerial involvement in assessing the voluntariness of a petition. In circumstances where management has been actively involved in the origination, preparation or circulation of the petition, the Board will generally not accord the document any weight. Additionally, where evidence indicates that an employee might reasonably suspect that management supported the petition, tacitly or otherwise, thus raising concerns that management might become aware of who had and who had not signed a statement of desire in opposition to the union, the Board, similarly, will normally dismiss the petition. (See *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813; *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545; *Radio Shack*, [1978] OLRB Rep. Nov. 1043 and the cases cited therein; *Peacock Lumber Ltd.*, [1979] OLRB Rep. May 423; *Terminal Hotel*, [1979] OLRB Rep. June 580 and *Groves Park Lodge*, [1980] OLRB Rep. Feb. 235).

18. In assessing the voluntariness of a petition and ascertaining the reasonable perception of employees who signed the document, the Board in both *Radio Shack* and *Peacock* stressed the importance of the general atmosphere in which a petition is signed.

19. In this case the petition was signed on the company premises, at a work station, throughout the working day. These factors standing alone do not automatically indicate that the petition is not a voluntary expression of employee opinion. Their impact, however, must be accounted for in evaluating the general atmosphere in the plant at the time the petition was signed and the probable perception of employees signing the document.

20. In some apparent effort to avoid detection by management, the Committee sought to control the flow of employees to Ms. Trahan's desk. In so doing they formed a chain of communication between and within departments which, in the Board's opinion, could well have attracted management's attention. Both foremen's offices and the main office are directly adjacent to the work areas from which employees went to sign the petition. Although Ms. Trahan testified that it is not unusual for employees, from time to time, to come to her desk to use the telephone, there is no evidence to suggest that a procession of at least twenty-eight people to Ms. Trahan's desk in one six hour period, sometimes in small groups, was anything but highly unusual and recognizable as such by employees. In these circumstances, the Board concludes that employees, would, with reason, have become concerned that management either knew about the petition and approved of it, or would soon find out about it, as they in fact did.

21. Furthermore, the Board cannot ignore the potential impact of the rumours that were going around the plant that if the union got in, the plant could close down. Although the Board is satisfied that there was no intention on the part of management to influence the application for certification when it laid off six employees hours after posting the Form 5 Notice to Employees, the Board concludes that the fact of the lay-off, during which Ms. Trahan was called in by management as an observer, may well have lent added credibility to the rumours that the plant might shut down if the union got in. Furthermore, there is uncontradicted evidence that Bill Darrah, a close relative of management, was himself circulating the rumour.

The Board does not seek to circumscribe the freedom of expression of an employee by virtue of the position of his relatives. In all of the circumstances of this case, however, the Board must recognize that an employee who heard the rumour of a possible plant shut down from Bill Darrah, as did Ms. Quintal, would have reasonably suspected that he was privy to management information.

22. Another circumstance which causes the Board concern is the fact that Ms. Trahan created a separate petition for people who had previously signed union membership cards. Just as the Board never fully understood the purpose of this division, it may well be that persons who signed the petition didn't either. In the circumstances of this case, the Board is not satisfied that this unusual division, obviously communicated to employees, had a neutral impact on the signatories of the petition.

23. In this case the collection of the signatures on the petition was done not only on company premises, during working hours, but also openly, under the eyes of management, and over an extended period of time. Whether members of management in fact had their eyes open that day is not the question. The Board's concern is whether an employee, in the circumstances, would have had reason to believe that management either in fact knew about the petition and tacitly condoned it or would probably find out about it. In light of the foregoing evidence, the Board concludes that the circumstances were such that employees would reasonably suspect that management either knew or would come to know about the petition. The Board further concludes that employees would reasonably have been influenced by a fear that management would ultimately learn who had and who had not signed the petition against the union. The uncontradicted evidence in this case is that ultimately a foreman did in fact see the petition and search for two particular names on it. On a careful review of all the evidence, the Board must conclude that the circumstances surrounding the circulation of the petition in question would have raised very real concerns among the employees going to the heart of their employment relationship.

24. Finally, the lack of evidence to acquaint the Board with what was said about the petition to some employees who could not speak English prior to signing the petition leaves a significant gap in the evidence.

25. When all of the above circumstances are assessed together, the Board is not satisfied that the petition represents a voluntary expression of desire. The Board, therefore, does not view the petition as reliable evidence of a voluntary change of heart on the part of those employees who had, only a short time before, signed membership cards for the union. Accordingly, the board declines to exercise its discretion under section 7(2) of the Act and relies on the union's membership evidence as filed.

26. A certificate will issue.

0217-80-U Local 1979 Retail Clerks International Union Affiliated with the Canadian Labour Congress, AFL-CIO, Applicant, v. **Wilson Automotive (Belleville) Ltd.**, Respondent.

Duty to Bargain in Good Faith – Union proposing acceptance of company's final offer after lengthy strike – Company demanding payment for losses suffered during strike or reduction in wages to compensate for strike – Proposal designed for rejection

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members H. J. F. Ade and M. J. Fenwick.

APPEARANCES: *Ian E. Reilly and Ronald Mastin for the applicant; R. D. Perkins and J. Wilson for the respondent.*

DECISION OF THE BOARD; July 8, 1980

1. This matter was filed as an application for consent to institute a prosecution for an alleged violation of section 14 of *The Labour Relations Act*, the section which requires the parties to bargain in good faith and make every effort to conclude a collective agreement. It was agreed by the parties at the hearing, however, that the application should be amended to become an application under section 79 of the Act for an alleged breach of section 14 on condition that the relief sought by the trade union be the issuance of a cease and desist order.

2. The parties agreed on the following statement of facts:

(1) The Respondent handed out to its employees on Wednesday, October 17th, 1979 copies of the following letter:

“Dear Employee:

The union has told us that it is going to try to persuade you to go on strike tomorrow (Thursday October 18th) in spite of the fact that our last offer of settlement will not be put to a vote until Friday, October 19th. This is most disappointing to me.

Last week we made an offer to the union which met nearly all of the union's demands. Only two serious issues remain:

1. the union's demand for large wage increases
2. the union's demand that the company deduct monthly union dues from employees' pay cheques without the employees' consent.

We offered a substantial wage increase as well as \$150.00 for back pay. We did not agree to the demand for a compulsory payroll deduction of union dues because we feel that every employee should have the right to decide for himself whether he wishes to pay dues to the union.

(Our offer is summarized at the end of this letter).

Some time ago the union conducted a strike vote among a small number of our employees. At the time of that vote a further bargaining meeting was scheduled to complete the negotiating sessions which were then in progress. In other words the employees who went to that meeting were being asked by the union to turn down a company proposal which the union knew was incomplete.

An employee's decision whether to engage in a strike or not is an extremely serious one. Strikes are always costly both to the employee and to the company. Business lost to a company during a strike is often never recovered, sometimes with the result that employees have to be laid off. I hope, therefore, that you will discuss this whole matter carefully with your family before making any decision. I believe the union should have reported to you fully and fairly on the company's offers before asking you to go on strike.

As a result of the union's failure to put our last offer to a vote before calling a strike and because we know that you have been many months without a wage increase, we have decided as a mark of good faith to put our last offer of settlement into effect on Thursday, October 18th, 1979. Every employee who continues working will receive the full benefits set out in the offer including retroactive pay.

May I suggest to you that a strike is not in your best interest nor in the company's best interest. May I suggest further that you reject the union's demand for a strike *now* and that you instruct the union either to accept the company's offer or to return to the bargaining table and continue to negotiate in good faith with a view to making an acceptable collective agreement.

Yours truly,

J. Wilson, President

Company's last offer

The company's last offer is set out in detail.

The following is a summary of the company's last offer to the union made on Thursday, October 11th, 1970.

(i) *WAGES: WAGE SCALE AND CLASSIFICATIONS
(EFFECTIVE UPON ACCEPTANCE)*

Class	Start	30 Day	6 Months	12 Months	18 Months	24 Months	36 Months
Receiver	3.75	4.00	4.15	4.30			
Truck Driver	3.20		3.45	3.60	3.75	4.00	

Janitor	3.95		4.10	4.25			
Lift truck Mechanic	3.45	3.70	3.85	4.00			
Counter Clerk	4.15		4.30	4.45	4.60	4.75	5.00
General Clerk	3.45		3.70	3.85	4.00		
Machinist	4.70		4.85	5.00			

	Start	500 hrs	1000 hrs	1500 hrs	2000 hrs	2500 hrs	3000 hrs
Machinist Apprentice	3.00	3.25	3.50	3.75	4.00	4.25	4.50

Bonus

Counter Clerks – 6% of House accounts prorated by salary for employees with one (1) year's service.

Machinists – after two and one-half (2½) times rate in production a bonus of 20% of excess.

All of the above wage rates will be increased by 20¢ per hour six months after signing.

Each employee employed on March 23rd, 1979 who is now employed shall receive an allowance of \$150.00 (pro-rated for absence during this period).

(ii) *Paid Holidays*

Paid holidays shall be seven statutory plus six religious.

(iii) *Vacations*

Vacations shall be:

- (a) Fewer than 10 years service – 2 weeks
- (b) Ten to fifteen years service – 3 weeks
- (c) More than 15 years service – 4 weeks

(iv) *Jury Duty and Crown Witness Pay*

Employer to pay difference between jury pay and regular wages.

(v) *Reporting Allowance*

Reporting allowance 4 hours guaranteed

(vi) *Call Back Guarantee*

Employee guaranteed four (4) hours if called back.

(vii) *Bereavement Pay*

Three days with pay for immediate family, one day with pay for others.

(viii) *Employee Purchases*

Discount to be continued (but not in agreement).

(ix) *Welfare Plan*

(a) Employer to pay O.H.I.P. premiums as follows:

- | | |
|---------------------------------|--------|
| (i) Start to ten years | – 50% |
| (ii) Ten years to fifteen years | – 75% |
| (iii) Over fifteen years | – 100% |

(b) Life insurance and Accidental death and dismemberment – (1 X earnings) – Company to pay same as (a)

(c) Dental Plan – 100% of X-rays, fillings etc. – Company to pay same as (a)

(d) Short term weekly indemnity – first day accident – 8th day sickness – 17 weeks – 66% of salary to maximum of \$300.00 – Company to pay same as (a)

(e) Long term disability – 66% of salary to \$1,500.00 maximum to age 65 or recovery – Company to pay same as (a)

(f) Health Guard Plan – 90% of prescription drugs paid – semi private hospital room, Employer to pay same as (a)

(g) Pension Plan – present plan to be continued

(h) Present sick leave plan – ½ (one-half) day per month – annual pay out to be continued”

- (2) On Thursday, October 18th, 1979 eleven employees elected to go out on strike and nine commenced picketing at the employer's premises at 29 Harriett Street in Belleville. The rest of the respondent's employees, (sixteen employees plus eighteen management staff) elected to continue working and have continued working up to the present time.
- (3) The picketing employees picketed the employer's premises daily from October 18th, up until April 8th, 1980 the date when six returned to work at their election.
- (4) The picketers carried on secondary picketing at the premises of various customers of the respondent and distributed letters to customers of the respondent urging them to discontinue doing business with the respondent. One of these letters reads:

'On October 17, 1979 we will be going on strike against WILSON AUTOMOTIVE. This will include their Lift Truck Division.

We are writing you so that you can make plans for obtaining your requirements and service from an alternative source.

Any inconvenience that our picketing of WILSON or his customers causes will be unavoidable, but, with this notice we sincerely hope you can arrange not to be inconvenienced.'

The union as of this date has not retracted the above letter.

- (5) As a result of the various activities of the picketers and other unknown persons the respondent company suffered a severe reduction in business. Some business lost during the picketing has returned. Much business lost during the picketing has not been recovered.
- (6) At a mediation meeting held on February 14th, 1980 the union amended its proposal on union security as follows:

The union proposed that all employees who now belonged to the union would remain members and pay dues and all new employees hired by the company would be required to join the union and pay dues.

The employer rejected the proposal and the conciliation officer terminated the meeting. There was no discussion of monetary or other issues.

- (7) On March 26th, 1980 the company through its counsel informed I. Riley, business representative of the Applicant that the company's

losses during the strike were substantial, that the company's proposal made on October 18th, 1979 could no longer be accepted as the basis for a collective agreement unless the union was prepared to restore the company to its position as of October 18th, 1979.

- (8) The parties met on April 14th, 1980 with Mr. Skinner for the purpose of resolving their differences. At that meeting the union indicated that it was prepared to withdraw its proposals for Union security and demanded that the company sign an agreement based on the October 18th proposal. The company indicated that it was prepared to have the question of the amount of its losses during the strike and its continuing losses assessed by an arbitrator. The company indicated that it was prepared to negotiate on the amount of its losses. The company said that the union would have to accept the principle that the company's losses during the strike were legitimately in issue. The company said that it was prepared to deal with the question either through a reduction in its proposal to its employees or by some form of lump sum payment from the union. The union refused to accept the principle that the company's losses during the strike were legitimately in issue and took the position that each side in a strike should be prohibited from bargaining on their losses.
- (9) Of the nine employees who picketed the employer's premises six returned to work on April 8th. The company undertakes to treat all employees who returned just short of the six-month limit the same as its other employees.
- (10) The union continued its efforts to persuade customers of the company to continue to withhold their business up to April 14, 1980.
- (11) The employer is operating at much less than its normal capacity but is required to retain most of its staff to attempt to recover lost business.

3. The union called Mr. William Kritsch, a 14 year employee of the respondent company who served as chairman of the union's bargaining committee. He was present at the meeting between the company and the union which took place on April 14, 1980. It is his evidence that the company informed the union that the only way Mr. Wilson (the owner of the company) could negotiate was if the union would reimburse him for \$100,000, or better, lost during the strike or accept a 50¢ per hour reduction in the rates of pay. Mr. Wilson testified that it was suggested that the union might have to accept 50¢ per hour less than had been offered at the commencement of the strike or make a lump sum settlement in the area of \$100,000 but that the figures were subject to arbitration and negotiation.

4. Section 14 of the Act stipulates:

"The parties shall meet within fifteen days from the giving of the notice or

within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.”

5. The purpose and extent of the duty to bargain in good faith are described in the *Goldcraft Printers Ltd.* case, Board File No. 1360-79-U, decision dated April 16, 1980 in the following terms:

“The Board has found that the duty operates on two levels. It operates to buttress the employer’s recognition of the trade union as the exclusive bargaining agent of all bargaining employees. The duty also operates to preserve and maintain the decision-making framework which is essential to meaningful collective bargaining. The Board has found that this second aspect of the duty requires an employer to provide the union with data necessary to its bargaining capability, to engage in full and open discussion on all matters in dispute and to refrain from tactics which upset or destroy the decision-making framework.

At the recognition level the duty ensures that at the very least the parties share the common objective of concluding a collective agreement. The Board, however, has been careful in its jurisprudence to emphasize the principle of voluntarism which underpins the collective bargaining process. The parties must intend to enter into a collective agreement but the content of that agreement is to be determined by the parties themselves through the process of negotiation and if necessary, negotiation assisted by economic sanction. The Board aptly summarized the extent of the duty in the *Ottawa Journal* case, [1977] OLRB Rep. Nov. 748 wherein at paragraph 12 the Board stated:

‘The duty to bargain in good faith is administered by this Board in such a way as to improve and facilitate the practice and procedure of collective bargaining. This approach recognizes, however, that the results of collective bargaining are necessarily dictated by the relative economic strength of the bargaining parties. Although the Board should make every effort to restore a bargaining relationship and re-establish the dialogue between the parties to that relationship, it should not go so far as to redress any imbalance of bargaining power that might exist in a particular bargaining situation.’

(See also *The Daily Times of Brampton* case, *supra*, and *Fashion Craft Kitchens*, [1979] OLRB Rep. Oct. 967. The Board does not regulate the content of collective agreements. In appropriate circumstances, however, the Board will draw an adverse inference with respect to the intent of a party to enter into a collective agreement if it persists in tabling patently unreasonable proposals.

In the recent *Radio Shack* decision ([1979] OLRB Rep. Dec. 1220), the Board dealt specifically with the need for circumspection in first agreement situations; especially those in which the employer has committed

unfair labour practices in an effort to stem the union's organizing. The Board put its mind to the difficulties presented in assessing bargaining behaviour in first agreement situations at para. 74 of that decision and stated:

'In discussing the nature of the bargaining duty, we noted the difficulty of distinguishing hard bargaining from conduct which is more in the nature of 'going through the motions', and lacking any real intention of signing an agreement – 'surface bargaining' if you will. Experience has taught this Board that it must be particularly sensitive to this distinction in first contract situations. Few employers willingly embrace collective bargaining, but most accept the right of the employees to participate in that process and negotiate first agreements with duly certified bargaining agents without rancor or controversy. This, of course, does not mean that all first agreement controversy is a product of anti-union animus or that good faith bargaining in first agreement situations must always end in a contract. Neither proposition would be true... The Board should not conclude lightly that an employer is merely engaging in hard bargaining in such situations or that it is exercising its freedom of speech in communicating directly with bargaining unit employees. The nuances of each case must be considered and earlier employer unlawful conduct may trigger a detailed assessment of bargaining activity. The legitimate concern for 'freedom of contract' of 'freedom of speech' ought not to blind the Board to abuses committed under either banner, and that strike at other equally fundamental tenets of the legislation.'

While the principle of voluntarism is fundamental to the collective bargaining process the Board must not be blinded by it in critically assessing what is portrayed as hard bargaining. This is especially so in first agreement situations where an employer who maintains he is engaging in hard bargaining has previously attempted to upset the union's organizing efforts by unlawful means."

6. The issue before the Board in this case is whether the bargaining stance adopted by the company on April 14, 1980 is in violation of the section 14 duty. The union takes the position that the company breached the duty when it introduced a new ingredient into the negotiations at the point in time when the union was prepared to settle on the company's terms. In addition, the union maintains that the new ingredient itself, a demand to make the company whole for the losses suffered during the strike, is contrary to the section 14 duty. The union argues that the company is attempting to penalize it for exercising its right to strike. Finally, the union characterizes the company's position as one which has been formulated to ensure that it does not have to enter into a collective agreement with the trade union. The company relies on the concept of voluntarism as the underpinning of free collective bargaining and argues that, having suffered extensive losses over a protracted period of time, it is entitled to alter its bargaining position to reflect the altered situation. The company maintains that its willingness to arbitrate the amount and negotiate on the result should dispel any doubt that it might not be bargaining in good faith.

7. We start with the long held view of this Board that “the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment.” (See the *DeVilbiss (Canada) Ltd.* case, [1976] OLRB Rep. March 49 at para. 13.) This Board recognizes the concept of voluntarism as relied upon by the respondent company. As a general proposition a party is free to take whatever position best satisfies its self interest providing it maintains the intention of concluding a collective agreement. The difficult cases arise where a party tables a position which it maintains is legitimately in its self interest but which the other side maintains is destructive of the process or designed to avoid a collective agreement and to undermine the trade union. In the *Pine Ridge District Health Unit* case, [1977] OLRB Rep. Feb. 65 the Board noted:

“Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, “Take it before I change my mind” reflects a widely accepted bargaining precept that has its proper application in collective bargaining...”

(See also *Toronto Jewellery Manufacturers' Association* [1979] OLRB Rep. July 719).

However, the Board's views as expressed in the *Pine Ridge District Health Unit* case, *supra*, cannot be taken as a carte blanche to alter one's bargaining position at any time and for any reason. Clearly, an alteration of position designed to wreck the critical decision-making framework necessary for collective bargaining would be contrary to section 14 of the Act. (See the *Graphic Centre (Ontario) Inc.* case, [1976] OLRB Rep. May 221.) Similarly, the move to a position tailor-made for rejection would betray an intention not to conclude a collective agreement contrary to the duty imposed by section 14 of the Act. It follows, therefore, that while the parties may govern themselves by self-interest and may alter bargaining positions in response to changes in relevant conditions, a party which alters its bargaining position may leave itself open to the allegation that it is bargaining in bad faith. It falls to the Board in these cases to examine the evidence in light of the labour relations dynamics and draw the appropriate inferences.

8. It is clear on the evidence before us in this matter that the company has suffered substantial losses as a result of a protracted strike. We have no hesitation in expressing the view that if the financial condition of a company deteriorates after it has made a monetary offer in collective bargaining, but before the union has accepted that offer, the caution referred to in the *Pine Ridge District Health Unit* case, *supra*, would apply. At the very least, this company had cause to reconsider the position it tabled with the union on October 17, 1979 as its financial condition deteriorated during the course of the strike. Indeed, if the company had made known its intention to reconsider its position at the earliest possible date and if it had simply tabled a revised package based on diminished ability to pay and had commenced to pay those at work on the basis of its revised offer, this Board would have been hard pressed to find a violation of the Act.

9. This company, however, waited until some twelve days before the expiry of the 6-month period during which employees engaging in a lawful strike are entitled to claim their jobs under section 64 of the Act, before announcing that its last offer could no longer be considered as the basis of a settlement. Although its financial position deteriorated during the course of the strike, the company did not advise the union of its revised approach until March 26, 1980; 5½ months after the commencement of the strike and 5½ months after it put the rates contained in the last offer into effect. When the parties returned to the bargaining table on April 14, 1980 the company, as a condition of settlement, required the union to agree to a calculation of the losses incurred by it during the strike. The company did not simply table a revised offer based on diminished ability to pay but tied the settlement to restitution for the losses incurred by it during the period of the strike. The difference in emphasis is critical to the determination in this matter where the company paid those who worked during the strike and those who returned to end the strike on the basis of its last pre-strike offer. Although entitled to unilaterally determine terms and conditions of employment during the period of the strike, the company paid the higher rates throughout the strike, continued to pay these rates when the strikers returned to work, but made it clear to the union on April 14th that it was not prepared to enter into a collective agreement on the basis of these rates. While the company's offer contained the option of paying a lump sum in restitution rather than accepting a reduction in direct wages, the net effect upon the members of the trade union would be identical regardless of the option chosen.

10. A natural suspicion attaches to the motives of an employer who alters his bargaining position at a critical stage in negotiations; this is especially so where the negotiations are for a first agreement. When, as in this case, the employer does not simply table a revised position based on his projected ability to pay, but requires the trade union to agree to a calculation of the company's losses during the strike and the subtraction of these losses from the company's last offer, the concern increases. When the employer who is revising his position in this manner has paid those working during and after a strike on the basis of his last pre-strike offer and has not unilaterally cut these rates in response to changing economic conditions as he is entitled to do, the Board must draw the inference that the employer no longer has the intention of entering into a collective agreement. The decision of the company to continue to pay at the level of its past pre-strike offer throughout the period, coupled with the tabling of a position which requires the union to agree to a calculation of its losses during the strike, and makes the signing of a collective agreement conditional on a reduction in wages equal to the company's losses, creates a Hobson's choice for the trade union. The union is put in the position of having to agree to the company's proposal, thereby identifying itself as the cause of a reduction in the employees' wages based on the cost to the company associated with a legitimate exercise of the right to strike (in effect the imposition of a penalty on employees for having exercised the right to strike), or of abandoning the employees who have chosen the union to represent them collectively. In the circumstances, the proposal must be characterized as having been designed for rejection. Even if the trade union was prepared to accept such a proposal, which is doubtful to say the least, the employees whose wages would be reduced to make the company whole for the losses incurred by it during the strike, would most certainly reject it. On the facts we can come to no other conclusion but that the company's bargaining strategy was designed with this result in mind.

11. Having regard to all of the foregoing, we are satisfied on the evidence before us that as of April 14, 1980 the respondent company did not negotiate with an intention to conclude a collective agreement and hence we must find the respondent company to be in violation of

section 14 of the Act. Having regard to the foregoing and to the nature of the relief requested we hereby direct the respondent company to cease and desist from bargaining in bad faith.

ADDENDUM OF BOARD MEMBER M. J. FENWICK:

1. I agree that the OLRB does not regulate the content of collective agreements and that voluntarism in bargaining must prevail. I also agree and concur in the finding that this company is not bargaining in good faith and has therefore violated section 14 of the Act.
 2. In this case the respondent company has implemented what in effect is a collective bargaining agreement, terms of which were offered to union negotiators on October 11, 1979, communicated by the company to the employees on October 17, 1979 and implemented on October 18, 1979.
 3. The only issue dividing the applicant union and respondent company and which is the subject of the union's complaint, is the employer's unusual demand that the union reimburse the firm \$100,000 or better for business it lost during the strike. The payment is to take the form of a wage cut or a lump sum payment to this company. The Board has found that this demand in the circumstances of this case constitutes bargaining in bad faith.
 4. If the relief sought has not been circumscribed by the agreement of the parties, I would have directed the parties to sign an agreement containing the terms of the company's last offer. Precedent for such a directive is the *Municipality of Casimir, Jennings and Appleby* case, [1978] OLRB Rep. June 507, paragraph 40. If this company does not now sign an agreement on these terms it would be my view that the union can return to the Board and seek such relief.
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1936-79-U Ontario Taxi Association 1688, Canadian Labour Congress, Complainant, v. **Windsor Airline Limousine Services Limited** carrying on business as Veteran Cab Company, Respondent.

Change in Working Conditions – Discharge for Union Activity – Employees laid off for union activity – Employer eliminating one classification and changing working hours of another during freeze period – Change taking place after employees voting for it – Whether violation of section 70 (Decision omitted inadvertently from June Report)

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members B. Armstrong and F. W. Murray.

APPEARANCES: *Jeffrey Egner, David Reynolds and Jack McDowell for the applicant; Charles F. Clark and William Oag for the respondent.*

DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER B. ARMSTRONG; June 23, 1980

1. The name “Windsor Airline Limousine Services Ltd. Veteran Taxi Co. (Subsidiary)” appearing in the style of cause of this complaint as the name of the respondent is amended to read: “Windsor Airline Limousine Services Limited, carrying on business as Veteran Cab Company”.

2. This is a complaint filed under section 79 of the Act alleging violations of sections 70, 56 and 58 of the Act. The complainant alleges that Pauline Miliucci and Linda Brown, telephone operators with the respondent company, were discharged from their employment contrary to *The Labour Relations Act*; specifically the complainant alleges that the decision to eliminate the grievors’ positions as telephone operators in January, 1980 was motivated by anti-union animus and constituted a violation of the section 70(2) freeze on terms and conditions of employment. In addition, the complainant also alleges that a change in the work hours of dispatchers put into effect at the same time constitutes a violation of the section 70 freeze.

3. The complainant commenced to organize the respondent’s employees in later August, 1979. Three separate certification applications were filed in September, 1979. In addition, three unfair labour practice complaints were filed with the Board. The respondent in turn challenged the Board’s constitutional jurisdiction to regulate the labour relations between itself and its employees. The respondent argued that its labour relations are properly governed by federal law. However, in an oral decision made November 16, 1979, and later confirmed in writing, (see *Windsor Airline Limousine Services Ltd.*, [1980] OLRB Rep. Feb. 272), the Board rejected the respondent’s submissions in this regard and assumed jurisdiction. Thereupon, the respondent withdrew from the earlier proceedings and the Board proceeded in its absence. In each of the unfair labour practice complaints before it, the Board adopted as proven the chronology and particulars of misconduct as filed by the complainant. The Board found, therefore, that the respondent company had engaged in a number of violations of the Act. The Board went on to certify the complainant trade union under the provisions of section 7a of the Act as bargaining agent for a unit of dispatchers. The issue of the employee status of those in a proposed unit of owner/operators and in a proposed unit of drivers is presently

before the panel of the Board subject with the application for certification and has yet to be decided.

4. There is presently an application for judicial review pending in the courts. Following its application for judicial review, the respondent also sought a stay of the Board determinations referred to above. The motion for a stay was denied. The respondent, therefore, while continuing to challenge the constitutional authority of the Board, appeared at the hearing in this matter, led evidence, cross-examined the complainant's witnesses and made submissions on the issues raised by the complaint.

5. In March of 1979, a fire destroyed the respondent's taxi cab dispatching facilities in Windsor. As a temporary measure, the dispatching function was moved to a trailer. While the permanent facilities were being repaired, the respondent investigated the possibility of switching to a new system using telephone operators in place of dispatchers to receive incoming orders. The advantage to the company of such a system is the lower rate paid to the telephone operators. William Oag, executive assistant to the president of the respondent, visited taxi cab operations in London to determine the feasibility of substituting telephone operators for full-time dispatchers in the handling of incoming calls. Dispatchers with extensive cab experience would continue to operate the radio equipment by which contact is maintained with the fleet and orders given to individual drivers. In July, 1979 the respondent decided to employ telephone operators and interviewed eleven applicants for two positions. The grievors were interviewed by Mr. William Oag and Nelson Vincent head supervisor. The grievors were informed that their duties would consist of answering the telephone and distributing orders to dispatchers. The grievors were told that the system was new and novel but that the company hoped it would be permanent. Nelson Vincent informed the grievors that the respondent would attempt to use telephone operators during the summer time (the slow season) and that the respondent might have to reassess in the fall. Mr. Vincent found the grievors to be alert and, in his opinion, the most suitable applicants for the job. Pauline Miliucci commenced employment in July, 1979, and Linda Brown started work shortly thereafter. Initially, both grievors worked in the trailer for a time, and were transferred to the rebuilt permanent facilities by September, 1979.

6. The company utilizes about 100 telephone lines. The two telephone operators were responsible for accepting the incoming calls and distributing orders for "trips" to either the east or west dispatcher depending on the customer's location in the City of Windsor. Ms. Miliucci testified that her training consisted of watching another dispatcher perform the function for about half an hour after which she performed the duties on her own. Both grievors were of the view that after a couple of months they were sufficiently familiar with the streets to carry out their duties efficiently. Ms. Brown received pay raises during the relevant period. Ms. Miliucci lives in the eastern part of Windsor while Ms. Brown has lived in Windsor all her life.

7. Mr. Oag testified that complaints about the telephone operators began immediately after the institution of the new system. For the most part, complaints were of two types: dispatchers complained that telephone operators were unable to relieve them on breaks and occasionally, customers complained that orders were wrong. Mr. Oag at no time mentioned such complaints to the telephone operators. Mr. Vincent mentioned to Ms. Miliucci, at one point, that she ought to repeat the address to the customer in order to ensure that it is correct. Ms. Brown was told on a couple of occasions that she had forwarded wrong addresses. The

respondent did not keep a log of such complainants and no evidence was given in respect of specific complaints. At no time prior to discharge did the respondent indicate to the grievors that the system was not working. Mr. Oag testified that by the end of October, 1979 it became obvious that the system of utilizing telephone operators in place of dispatchers was not working. General reference was made to the mistakes made by the telephone operators in taking information down over the phone and relaying that information to the dispatchers and to the inability of the telephone operators to provide relief to the dispatchers during their breaks. Mr. Vincent testified that the company came to the conclusion that the telephone operators could not do the job as well as retrained cab drivers.

8. In September, 1979, both grievors applied for membership in the complainant union. It has been found by this Board that on September 25, 1979, Pauline Miliucci was informed by Stu Caverhill, supervisor, that management would not think very highly of her if she failed to sign an anti-union petition circulated in the dispatch office. Ms. Miliucci was also approached by Stan Heeney, supervisor, to sign the petition. She refused. She was later removed from day shift and assigned to night shift exclusively. On November 14, 1979, the Ontario Labour Relations Board ruled such action to be in contravention of the Act, and ordered Ms. Miliucci to be reinstated to days. Nevertheless, the respondent employer kept Ms. Miliucci on night shift until her dismissal.

9. After joining the union, Linda Brown attended a public meeting of its members. It is her uncontradicted evidence that Stu Caverhill, supervisor, informed her that it was known that she was involved in union activities and that the respondent employer wanted to get rid of her. The respondent employer failed to call Stu Caverhill as a witness in these proceedings.

10. In January, 1980, the respondent eliminated the position of telephone operator entirely, discharged the grievors and at the same time rescheduled the hours of work of its dispatchers. It is not clear on the evidence whether there exists a direct cause and effect relationship between the two decisions. However, the timing of the two decisions was coincidental. There was no prior discussion with the union concerning either the discontinuance of the use of telephone operators or the change in hours of the dispatchers. The Board heard evidence that the dispatchers wanted the change to four 10-hour days and that the change was made after a vote of the dispatchers. The respondent reverted to the previous schedule of hours two weeks before the hearing in this matter. Neither of the grievors was told at the time of discharge that their work had not been performed in a satisfactory manner. Mr. Oag explained that the delay from October, when it became evident that the system was not working, to January, when the respondent acted to end the system, was the result of a reluctance on his part to admit to a business mistake.

11. Subject to its submission that this Board lacks constitutional jurisdiction, the respondent accepts that under section 79(4a) of the Act, the onus is upon it to satisfy the Board that neither Ms. Brown nor Ms. Miliucci was discharged for trade union activity. The respondent argues that the evidence discloses that the use of telephone operators was an experiment, that the grievors were told at the outset that the system might not be permanent and that efforts were being made to improve the system as early as October, 1979. The respondent maintains that legitimate business considerations caused it to conclude that the dispatching of taxi service in the City of Windsor is better facilitated if persons with previous experience driving a cab are used to accept the incoming calls and to dispatch the individual

cab. It is the respondent's position that because neither Ms. Miliucci nor Ms. Brown has a taxi cab licence or has ever driven a cab, they had to be let go when the respondent decided to revert back to the previous practice of using dispatchers only. The respondent argues that a new, novel and experimental approach tied to the use of telephone answerers in connection with dispatching did not work out; not because the telephone operators joined the complainant trade union, but because the nature of the job required cab driving experience and because telephone answerers without cab driving experience were unable to provide dispatchers with adequate relief. The respondent asks the Board to find that subsequent to the decision to discontinue telephone answering, but in the same time frame, a request was made by the dispatchers for the institution of ten-hour shifts. It is the contention of the respondent that these shifts were properly instituted by the respondent in order to permit the proper scheduling of dispatching services and relief time for dispatchers after the dispatchers had voted unanimously in favour of the change.

12. The complainant, relying on the *Barrie Examiner* case, [1975] OLRB Rep. Oct. 746, argues that the respondent must establish on the balance of probabilities that the reason given for the termination of the two telephone operators is the only reason and that it is free of anti-union animus in order to establish that no violation of the Act has occurred. The complainant asks the Board not to accept the explanation put forward by the respondent as the real reason for the termination of the telephone operators. The complainant maintains that the drawbacks to the new system which have been relied upon were predictable from the beginning in that the employer knew that telephone operators would not be able to relieve dispatchers and were not as knowledgeable about the local geography as persons who had driven a cab. Notwithstanding these drawbacks, the employer went ahead with the new system and persevered with it through the busy fall and Christmas seasons. The complainant maintains that the reason advanced and the timing of the decision to discontinue the use of telephone operators, when considered in light of the evidence which establishes that both Ms. Brown and Ms. Miliucci were the objects of anti-union animus and the history of the employer's anti-union activity, must cause the Board to conclude that the grievors were discharged for their support of the complainant trade union. The complainant, relying on the *Rest Haven Nursing Home* case, [1979] OLRB Rep. June 554, argues that the elimination of a classification of bargaining unit employees constitutes a violation of the statutory freeze as does the change in the dispatchers' hours of work.

13. Section 58 of the Act makes it an offence to refuse to employ or to continue to employ a person because the person is or was a member of a trade union or was or is exercising any other rights under the Act. Section 79(4a) of the Act provides that on an inquiry by the Board into a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer. In this case, therefore, the legal burden is upon the respondent to establish that the termination of Ms. Miliucci and Ms. Brown was not in violation of the Act. The Board has consistently held, as in the *Barrie Examiner* case, *supra* that:

"...the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and second, that these reasons are

not tainted by any union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

(See also the *Pop Shoppe* case, [1976] OLRB Rep. June 299.)

14. The evidence adduced by the respondent employer as to the business purpose of his decision to discontinue the use of the telephone operators is problematic at best. The company knew when it went to telephone operators that its capacity to provide relief to the dispatchers would be reduced. Nevertheless, the company went ahead with its decision and continued to use telephone operators through the busy fall and Christmas season. The evidence does not establish incompetence or even serious operating deficiencies. The two telephone operators each admitted that on isolated occasions they had been spoken to about wrong addresses. The company did not keep any record of customer complaints or wrong addresses channeled through the telephone operators. Mr. Oag never spoke to either of the two women concerning inadequacies in their work and the evidence of Mr. Vincent and Mr. Heeney does not contradict the evidence of either Ms. Miliucci or Ms. Brown with respect to the number of times they had been spoken to by the company. It is not disputed that both women were capable of operating switchboard. The only other major component of the job was the correct identification of each trip as either east or west. We accept the grievors' evidence that after a few months they were reasonably competent in this regard. Indeed, it is not surprising that after a few months two “alert” employees who lived in the City of Windsor (one all her life) would be sufficiently knowledgeable of the local geography to correctly designate trips as either east or west. While the company may have made a decision to discontinue the telephone operators for legitimate subjective reasons, the evidence does not establish any compelling objective basis upon which the decision to discontinue was made.

15. In the absence of a compelling objective basis for the company's reconsideration of its decision to employ telephone operators, the Board is forced to look carefully at all of the circumstances surrounding the termination of the two grievors. The union commenced to organize in late August and filed applications for certification which were dealt with by the Board in November, 1979. The advent of the trade union, therefore, was an event of major significance which occurred during the period of reassessment. The Board has found in a prior decision that Ms. Miliucci was removed from day shift and assigned to night shift in contravention of the Act. The respondent failed to comply with the order of the Board that she be reinstated to her day shift and kept her on the night shift until her dismissal. Ms. Brown gave uncontradicted evidence that Mr. S. Caverhill, supervisor, informed her that the company knew she was involved in union activities and that the company wanted to get rid of her. The company failed to call Mr. Caverhill and in the result Ms. Brown's evidence must stand. In the face of the company's knowledge of their support for the trade union and the admission against interest of Mr. Caverhill that the company wanted to get rid of Ms. Brown because of her trade union affiliation, and in the absence of a credible objective basis for the decision to do away with the use of telephone operators, the Board has not been satisfied on the balance of probabilities that the company's decision to discontinue its use of telephone operators and terminate the employment of Ms. Miliucci and Ms. Brown was free of anti-union considerations. Accordingly, we hereby find that the termination from employment of both Ms. Miliucci and Ms. Brown was in violation of section 58(a) of *The Labour Relations Act*.

16. We hereby order that forthwith Miss Miliucci and Ms. Brown be reinstated to their

employment as telephone operators with the respondent company and that they be compensated for their lost earnings from the date of their termination to the date of their reinstatement. The Board will remain seized in the event the parties are unable to agree to the exact amount owing the two employees upon their reinstatement.

17. We now turn to the alleged breach of section 70 of the Act. Section 70(2) of the Act provides:

“Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until:

- (a) the trade union has given notice under section 13, in which case subsection 1 applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.”

The purpose of the “freeze period” established by section 70 of the Act is to facilitate the bargaining process by providing a fixed point of departure and a period of tranquility and stability in which to conduct negotiations for a collective agreement. (See re *Canadian General Electric Company Limited*, [1965] OLRB Rep. Dec. 649, *Ottawa General Hospital*, [1972] OLRB Rep. June 681, *Canron Limited Eastern Structural Division*, [1976] OLRB Rep. Aug. 436 and *Carleton University*, [1978] OLRB Rep. Feb. 184.)

18. In this case the respondent employer has eliminated one bargaining unit classification and altered the hours of a second bargaining unit classification during the period when working conditions may not be altered. In applying section 70 of the Act the Board, while recognizing an employer’s right to manage, has utilized a “business as before” point of reference. The Board stated in *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859:

“23. The ‘business as before’ approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.”

19. The telephone answerer classification had been in existence for over six months at the time it was eliminated. The company instituted it in July, well before the union applied to be certified, and maintained it throughout the fall and Christmas season. The evidence does not disclose any compelling business reason for eliminating the classification in January, 1980. The reasons cited were reasons which existed at the time the classification was established and which did not deter the company from instituting the classification or living with it for six months. In the circumstances of this case, therefore, we are not satisfied that the employer's right to manage overrides the prohibition against any alteration in the terms and conditions of employment covering the employees in the bargaining unit at the time of the commencement of the freeze. The period during which it might reasonably be said that a trial was in place had elapsed and the system was in place at the commencement of the freeze period. Accordingly, the "business as before" approach requires us to conclude that the elimination of the classification constituted a breach of the section 70(2) freeze. We find support for our conclusion in the *Rest Haven Nursing Home* case, *supra*; a case in which the Board found that the elimination of one of the two categories of employees in the bargaining unit constituted a violation of section 10 of *The Hospital Labour Disputes Arbitration Act*, R.S.O. 1970. a section identical in all respects to section 70(2) of *The Labour Relations Act*. Having regard to all of the foregoing, we hereby find the respondent company's unilateral elimination of the telephone answerer classification in January, 1980 constitutes a violation of section 70(2) of the Act and we so declare.

20. The alteration of the hours of work of dispatchers is a less difficult matter to decide. The dispatchers were working 5 eight-hour days per week at the commencement of the freeze period and had been working these hours for a long period of time. Some two months into the freeze period the employer conducted a vote of the dispatchers in order to determine if there was widespread support among the dispatchers for a change to 4 ten-hour days per week. The holding of a vote prior to implementing a change of working conditions during the section 70 freeze period cannot affect the outcome of a section 70(2) complaint and may be viewed as an attempt to circumvent the certified bargaining agent whose consent is required for any change in terms or conditions of employment. In the *Beaver Electronics Limited* case, [1974] OLRB Rep. Mar. 120, the Board dealt with a situation where the employer obtained approval from the bargaining unit employees to change the hours of work during the freeze period. In finding a violation of the Act the Board commented:

"...should an employer seek employee approval of a rescheduling of working hours at a time prohibited by subsection 1, that employer may very well be in violation of subsection 1 of section 59 of the Act. In that case, employees who have waived privileges at the behest of an employer for purposes of subsection 1 of section 70, may have put the employer in a position where he is answerable to allegations of bargaining with employees at a time when 'a trade union continues to be entitled to represent employees in a bargaining unit. ...' In other words the Legislature in its wisdom has amply contemplated the position taken by counsel and thereby this Board must reject the argument submitted."

Similarly, in this case the respondent company cannot rely on the outcome of the vote to justify its decision to alter the dispatchers' hours of work. The respondent was prohibited by the operation of section 70(2) from altering the hours of work when it did. Accordingly, the Board hereby finds that the respondent company violated section 70(2) of the Act when it altered the

hours of work of the dispatchers and hereby directs that the hours of work in existence at the commencement of the freeze be reinstituted and maintained for the duration of the freeze period.

DECISION OF BOARD MEMBER F. W. MURRAY:

The decision of Mr. Murray will follow.

1047-79-U Ontario Secondary School Teachers' Federation, District II, Applicant, v. York County Board of Education, Respondent.

Lock-Out – Practice and Procedure – Elements for legal lock-out under *The School Boards and Teachers Collective Negotiations Act, 1975* considered – Whether closing of school during lawful strike lock-out – Whether declaration issuing

BEFORE: M. G. Picher, Vice-Chairman and Board Members C. G. Bourne and B. K. Lee.

APPEARANCES: *Maurice A. Green, James Forster, Eric McLean and Tony Bulson for the applicant; R. C. Fillion, M. Easson, S. G. Chapman and D. Disney for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN; July 24, 1980

1. This is an application under section 63(2) of *The School Boards and Teachers Collective Negotiations Act, 1975* (popularly known as "Bill 100" and hereinafter referred to as the Act). The applicant, (hereinafter referred to as "the Federation") is the bargaining agent of all high school teachers employed by the York County Board of Education. It has applied for a declaration that the Board of Education unlawfully locked the teachers out of its high schools in September of 1979. The complaint also requests that the Board order the Board of Education to compensate all of the teachers for wages lost as a result of the alleged unlawful lock-out.

2. The complaint is the outgrowth of a stormy bargaining relationship. In the spring of 1978 the Federation and Board of Education commenced negotiations to conclude a collective agreement for the academic year 1978-79. Negotiations continued through the spring and summer of that year. In the fall of 1978 a fact-finder was appointed pursuant to the Act. After the release of his report, the parties were still unable to reach an agreement and a mediator was further appointed to assist the parties in their negotiations in the late fall of 1978.

3. With the assistance of the mediator, negotiations continued through the winter and spring of 1979. There was still no success. After taking the necessary procedures under the Act, the teachers commenced a lawful strike on June 27, 1979. The strike took the form of a work to rule and was deliberately timed to coincide with the end of the academic year. The object was to cause minimal disruption to classes while maintaining pressure for a settlement before the re-opening of school in September.

4. Negotiations through the summer still did not produce a collective agreement. By

this time the parties had agreed to negotiate a two-year agreement that would encompass the academic year 1979-80. While the work to rule would obviously have its greatest impact when classes resumed, it was also enforced during the summer. The Federation promulgated special rules for three professional activity days at the end of June. While teachers completed the submission of marks for report cards, they did not do any administrative work such as time-tabling, administrative tabulation, or stuffing envelopes to get report cards mailed out. Apart from teachers who had already taken summer school jobs, teachers were to perform no work for or in the schools during the summer break. These rules also limited the amount of course preparation teachers were permitted to do. They could not, for example, engage in any administrative assistance or participate in the ordering of supplies and materials.

5. The rules established by the Federation for September were equally restrictive. These rules issued at the end of June and were therefore known well in advance by the Board of Education. They called for teachers to “teach as normally as possible in normally-scheduled classes” but not to do any other school-related tasks. For example, teachers were not to assign lockers, handle timetables, order supplies, take attendance, handle bus or insurance forms or attend any staff, department or committee meetings. Teachers were to do no extra-curricular activities, no distribution or collection of texts and no preparation or supervision except as might be done during regularly scheduled classes. They were to do no marking. They were not to enter the school until 15 minutes before the first class and were not to remain in the school beyond 15 minutes after the last class. Being aware of these rules, in the face of an ongoing stalemate toward the end of August, the Board’s trustees took steps to implement counter measures.

6. Faced with a lawful strike in the form of a work to rule, the Board of Education, subject to certain procedural requirements under the Act, was entitled to lock out the teachers or declare a state of lock-out to exist. Section 69 of the Act provides, in part, as follows:

“(1) Where a lawful strike takes place against a board, the board may lock-out or declare a state of lock-out to exist against all members, other than principals or vice-principals, of the branch affiliate that represents teachers engaged in the strike.

(2) No board shall lock out or declare a state of lock-out to exist or close a school or schools unless and until the proposal of the branch affiliate in respect of all matters agreed upon by the parties and in respect of all matters remaining in dispute between the parties last received by the board has been presented to a meeting of the board in public session.

(3) Except as provided in subsection 1, a board shall not lock out a teacher.”

7. The Board could also close the schools, without invoking a lock-out, if it had reason to believe that the safety of students, the security of school buildings and equipment, or the general operation of the schools were substantially threatened as a result of the strike. In this regard, section 69 of the Act also provides:

“(4) Where a lawful strikes takes place against a board, the board may close a school or schools where the board is of the opinion that,

- (a) the safety of students may be endangered;
- (b) the school building or the equipment or supplies therein may not be adequately protected during the strike; or
- (c) the strike will substantially interfere with the operation of the school.

(5) A teacher shall not be paid his salary in respect of the days on which,

- (a) he takes part in a strike, other than a strike as defined in sub-clause ii of clause 1 of section 1;
- (b) he is locked out; or
- (c) the school in which he is employed is closed pursuant to sub-section 4."

8. Against that background, the Board of Education met on Monday, August 27, 1979. In public session it considered and rejected the teachers' proposal then outstanding for the terms of a collective agreement. It then passed a resolution to lock the teachers out in the event that a memorandum of agreement should not be executed before the opening of school on September 4, 1979. The resolution of the Board was as follows:

"Part I

Resolved that pursuant to "An Act Respecting the Negotiation of Collective Agreements between School Boards and Teachers (1975 07)" section 69(1), The York County Board of Education having considered in public session the proposal of District 11, OSSTF in respect of all matters agreed upon by the parties and in respect of all matters remaining in dispute between the parties as presented in Form 7 of The Education Relations Commission dated 1979 08 02 reject the teachers' proposal.

Part II

Whereas the rules as outlined by OSSTF are in contravention to the duties of a teacher as outlined in The Education Act and Regulations and whereas The York County Board of Education is convinced that to try to conduct regular programs under these circumstances is:

- (1) dangerous to the safety of the students;
- (2) unfair to the students in that a final solution will be delayed;
- (3) divisive of the teaching staff since there are varying degrees of support for the present strike and
- (4) unfair to the taxpayers in that full salaries must be paid for less than full service

Be it resolved:

That The York County Board of Education declare that all members of District 11 OSSTF (except Principals and Vice-Principals) are locked out effective 1979 09 04 at 0800 hrs, unless a memorandum of agreement is signed before that time.

9. Negotiations continued through the week of August 27, 1979. By Friday, August 30, all issues dealing with the content of the collective agreement were agreed upon. While the monetary terms were not settled, the parties jointly resolved to send those issues to arbitration. There was, however, one outstanding and very contentious issue. Before signing any memorandum of agreement, the Board of Education insisted that the teachers take whatever steps necessary to eliminate the impact of the work to rule between the opening of classes on September 4, 1979 and ratification of the agreement, then scheduled for September 6, 1979. The Board was adamant that the schools should not open, even after a tentative settlement, under the extreme restriction of the work to rule that was then in effect. The Federation, on the other hand, was equally adamant in its refusal to either remove or modify its sanction pending ratification of the memorandum of agreement by the teachers.

10. That single issue was the subject of a long and difficult week-end of negotiation between the parties. With the assistance of the mediator the bargaining committees of both sides worked on the issue over the entire Labour Day holiday. Finally, on the evening of Monday, September 3, 1979, a memorandum of agreement was signed. The settlement came only after the teachers made a dual undertaking. Throughout the week-end the position of the teachers had been that the Federation negotiating team did not have the authority to end the work to rule and that only the teachers themselves could revoke it. As a way of resolving the impasse they gave the trustees of the Board of Education a verbal assurance that a meeting of the teachers would be held after school on September 4, 1979 to consider the status of the work to rule. They further assured the trustees that the opening day of school would be "as normal a day as possible under the circumstances".

11. The Board accepts the evidence of the Board of Education that its negotiators took the teachers' statement as an undertaking that the work to rule would be modified or conducted in such a way as not to interfere unduly with the operations of the schools on opening day. The trustees also believed that at the end of the opening day the body with the authority to amend or end the work to rule, the teachers themselves, would do so at a meeting called specially for that purpose. But that was not to be.

12. The next day events took a different turn. With the memorandum of agreement signed, the Board did not implement a lock-out. The high schools opened, but the teachers continued to observe the full work to rule according to the general terms of the Federation's rules. Teachers entered and left the schools 15 minutes before and after the scheduled school day. They did no administrative work. While there were some slight exceptions from school to school, in general there was no taking of attendance, no supervision other than in scheduled classes, no handing out of textbooks or assigning of lockers, nor any extra-curricular activity by the teachers. The work to rule was in full force.

13. The teachers' meeting held by the Federation at the end of the school day did not change the situation. All that resulted from that meeting was a single resolution, in the following terms:

"That District 11 advise the Board that its members are permitted to break the work to rule sanction in cases where there is an immediate, apparent jeopardy to the safety of a student or students."

14. Understandably the developments of that day had a strong and immediate impact on the trustees of the Board of Education. That evening they met in closed session. Through the Director of Education they received reports of how the day had gone in each of the Board's high schools. The reports, submitted in writing, were made by supervisory officers assigned to monitor the schools during the opening day. Several of the officers were also present at the meeting to report orally on what they had found. Their reports disclosed that the day had been, to all outward appearances, fairly normal. Teachers were in their classrooms and teaching was going on without undue disruption. There were the usual opening day lines at guidance offices for students requiring adjustments to their timetables. The work to rule did not create any special chaos in the area, however, largely because the bulk of the students in the system had been pre-registered prior to the beginning of the academic year.

15. While things went fairly smoothly, there was a negative side to the ledger. According to the reports in the hands of the trustees, and as the evidence before this Board confirmed, there was little or no administrative work done by teachers. Teachers did not take attendance, did not perform supervisory duties in hallways, study halls, or cafeterias, and did not perform normal opening day tasks such as helping students with their timetables or distributing lockers. There were no staff meetings scheduled or held, largely because the principals of the various high schools had been instructed during the course of the summer that in the event of work to rule, they should not schedule activities or make demands upon teachers that would force the teachers to break the Federation's rules. As a result of the work to rule the day was not as full and productive as it otherwise would have been. The degree of disruption was not enormous, however, and much of the administrative burden was fairly smoothly discharged because of the Board's own advance planning. A key factor was the level-headed attitude and extra administrative work of principals and vice-principals, who were not themselves participants in the strike, as well as the efforts of the administrative and secretarial staff of the high schools.

16. Although the Board of Education emerged relatively unscathed from the day's events, the predominant feeling of the trustees at day's end was anger aimed at the teachers in general and at their negotiators in particular. This Board had the benefit of a verbatim transcript of the closed meeting of the Board of Education that evening. Although the trustees differed to some degree in what they felt should be done in response to the continued work to rule, virtually all of them expressed a personal sense of anger and betrayal. They believed, after the settlement of the previous day, that the teachers' meeting of the afternoon of the fourth was intended, according to the undertaking of the teachers' negotiators, to lift or modify the work to rule pending the vote to ratify the settlement on Thursday, September 6. That did not happen. In fact, at the teachers' meeting a proposal from the floor that the work to rule be lifted was declared out of order. Neither cessation nor modification of the work to rule were put to the membership at the meeting. That development, communicated to the trustees at their meeting that evening, caused, predictably, a hostile reaction.

17. All the Board of Education got from the teachers' meeting was a motion to the effect that teachers could intervene in the event of any immediate apparent danger to students. This the trustees saw, with justification, as a "motherhood motion" in fact no different than the

existing Federation rules. By the rules promulgated at the beginning of the work to rule the Federation had instructed teachers that they could intervene in extra-classroom situations “where safety considerations or vandalism dictate”. The trustees viewed the Federation’s motion, as they reasonably could in all the circumstances, as an instrument of deliberate deception by the teachers.

18. At the outset of the closed meeting one of the trustees moved that the teachers be locked out. At this point, to be examined in greater detail below, events took a crucial turn for the Board of Education. The trustees were advised that technically they could not lock out the teachers. They believed that they could not then do that without considering and rejecting the teachers’ final offer in a public session of the Board. They then decided, since they already had an agreement in principle, that the only course of action open to them under the legislation was to close the schools pursuant to section 69(4) of the Act. After an extensive debate the Board of Education passed the following motion by a majority of 16 to 3, one trustee being absent.

“Whereas the secondary schools are under a lawful strike by District 11 OSSTF and whereas in the opinion of the Board the strike is substantially interfering with the operations of the schools,

Resolved that The York County Board of Education declares all secondary schools closed to be effective 0800 hours September 5, 1979 in accordance with “An Act Respecting the Negotiation of Collective Agreements between School Boards and Teachers” section 69(4)(c) which reads:

‘Where a lawful strike takes place against a board, the board may close a school or schools where the board is of the opinion that . . . the strike will substantially interfere with the operation of the school.’

And that the schools shall remain closed until the tentative agreement is ratified by both parties.”

19. The Board’s trustees also passed a motion cancelling a salary payment which the teachers would in the normal course have received on the Friday of that week. While the Federation alleged that this was a move calculated to bring further pressure on the teachers, the evidence is clear that the Board had to pass the motion. Under the Act it was not permitted to pay the teachers for the time they would not be in the schools as a result of a lock-out or closing under section 69 of the Act. The Board had planned for a lock-out from late August and had programmed its computerized payroll accordingly. Once the memorandum of agreement was signed at the last minute the lead time required to correct the computer didn’t allow the Board to reverse its lock-out payroll arrangement and pay the teachers according to the normal schedule. In other words, by its motion on the payment of salaries the Board was only ratifying an irreversible administrative step initiated at a time when it anticipated a lock-out. Unfortunately the Board of Education apparently saw no reason to explain the reason for the withholding of salaries to the teachers or their representatives.

20. The next morning all of York County’s high schools were closed. They remained closed for two days, until the morning of Friday, September 7, 1979, following the ratification

of the memorandum of agreement by the teachers on Thursday evening. The teachers were not paid for the two days.

21. The Federation submits that the closing of the schools was an unlawful lock-out. It argues firstly that it was not a closing within the meaning of section 69(4) of the Act. It maintains that the Board was not in fact motivated by a belief that two more days of work to rule would "substantially interfere with the operation of the school(s)" as it must before it can invoke the provisions of section 69(4)(c) of the Act. It submits that the school closing was a retaliatory measure aimed at putting pressure on the teachers and bolstering the present and future bargaining position of the Board of Education. The Federation's position is premised on its belief that the Board was not legally entitled to lock out its high school teachers on September 5 and 6, 1979. It therefore submits that the Board's purported closing of the schools was in fact an unlawful lock-out.

22. A preliminary but crucial question is whether under the provisions of the Act the Board of Education was in a position to lock out its teachers lawfully on September 5 and 6, 1979. Clearly the trustees did not then believe that they could. They therefore purported to act under a provision of the Act other than the lock-out provision. But if, in fact, the Board of Education was at that time entitled to lock the teachers out of its high schools, the fact that it imposed a lock-out in the guise of closing the schools under section 69(4)(c) of the Act would not make the lock-out unlawful. It is therefore necessary to determine first whether, when it closed the schools, the Board of Education was entitled to lock its high school teachers out.

23. Section 69 of the Act requires that two conditions be met before a board of education can lock-out its teachers. The first, imposed by subsection (1) of section 69, is that there must be a lawful strike in effect. In this the Act differs from most collective bargaining statutes that regulate the right to strike or lock out. Normally in Canadian collective bargaining schemes either party is free to initiate the use of economic sanctions, be it strike or lock-out, once certain mediative processes have been exhausted. The power of an employer to lock out its employees does not normally depend on the initiations of strike activity by the employees. It does, however, under the act that regulates collective bargaining for teachers.

24. In framing the statute the Legislature sought to balance the desirability of collective bargaining for teachers against the need to protect the interests of the public, and students in particular. It therefore established an elaborate set of procedures that must be exhausted before teachers can invoke a strike. These include formal notice to bargain, fact-finding and the publication of a fact-finder's report, as well as supervised votes among teachers conducted by the Education Relations Commission on both a Board's final offer and the decision strike. (See, generally, Downie, *Collective Bargaining and Conflict Resolution in Education* (Industrial Relations Centre, Queen's University at Kingston, Research and Current Issues Series No. 36 at pp. 81-2)). The procedures under the Act reflect a twofold purpose: to keep the public informed about the issues in what is, after all, a public interest dispute, and to channel the parties so as to maximize the possibilities of a negotiated settlement.

25. School board lock-outs were not possible before the passage of the Act. Under *The Education Act, 1974*, boards of education were statutorily required to keep their schools open without interruption. That is why the provision that boards may lock out or close their schools under section 69 of the Act is made to operate, according to subsection 5, "notwithstanding any provision of *The Education Act, 1974*". But in extending to boards of education the right

to lock out, the Legislature clearly intended, in the obvious interest of students, that the lock-out should be a reactive mechanism that can be invoked only in the event that strike action has begun.

26. In this case that condition was clearly met. "Strike" as defined in section 1(1)(ii) of the Act includes a work to rule. When the Board allegedly locked out its teachers illegally on September 4, 1979 the teachers had been engaged in an uninterrupted work to rule since June 28. It was still in force on the opening day of school, September 3, 1979. The first condition precedent to a lawful lock-out was therefore satisfied.

27. The second condition that must exist before a board of education can lock out its teachers is that its trustees must have been presented, in public session, with the proposal of the teachers. An obvious purpose of this provision is public accountability. Negotiations often go on behind closed doors. Section 69(2) of the Act insures that before a lock-out can be invoked the contract that would satisfy the teachers and avoid the conflict must be made known to all of the trustees and the public that elects them. This statutory precaution also gives teachers an independent way of knowing the details of their own negotiating committee's position. The requirement that public consideration be given to the teachers' proposal before they can be locked out is therefore in keeping with the twin themes of informing the public and maximizing the pressures for responsible bargaining and settlement.

28. The conditions that a strike be in effect and that the teachers' proposal be publicly considered are the only conditions imposed by the Act before a board of education can lock out its teachers. Both of those conditions were met when the high schools of York County were closed on September 4, 1979. At that time the teachers were continuing a lawful work to rule begun in June. The trustees of the Board of Education had, in public session on August 27, 1979, considered and rejected the contract proposal of the teachers that was then outstanding.

29. It is not disputed that once the right to lock out vests in a board of education it cannot be taken away unilaterally by the teachers. In other words, the teachers cannot undo the legality of a lock-out by submitting new proposals to their board of education and arguing that these must again be considered in public session before a lock-out can continue. The Act operates in a way that balances the resort to sanctions by both parties. Once the conditions precedent are met, a board of education's right to implement and continue a lock-out endures, no less than the right of the teachers to continue their strike, until a collective agreement is concluded. In this case when the Board of Education closed its high schools a collective agreement was not concluded. There could be no collective agreement until the memorandum of agreement signed on September 3, 1979 had been ratified by both parties.

30. The Federation maintains that in this case the right of the Board of Education to lock out its teachers under the Act nevertheless ended prior to the alleged lock-out of September 4, 1979. It submits that the Board of Education, as a statutory body, can only act upon the motion of its trustees. According to the teachers, when the Board of Education framed its lock-out motion as it did on August 27th, it dealt itself out of the ability either to initiate or continue a lock-out once a memorandum of agreement was reached because the operation of the lock-out motion was conditional on there not being a memorandum of agreement. Once the tentative agreement was signed on September 3, 1979 the Board was, according to the teachers, precluded from locking them out. In other words, the teachers argue that because of its own internal motion the Board of Education lost its ability to lock the teachers out under

The School Boards and Teachers Collective Negotiations Act at any time after September 3, 1979.

31. We cannot agree. The legality of a strike or lock-out under the Act is strictly a question of its timeliness. The Act concerns itself with the legality of a strike or lock-out only in the sense that neither sanction can be invoked until the procedures in the Act have been exhausted. The Act does not purport to regulate or condition the legality of a strike or lock-out on adherence to structures and procedures internal to either a board of education or a federation branch affiliate. As long as the conditions in the Act are met, a branch affiliate can no more object to the legality of a lock-out on the basis of the insufficiency of an internal board motion than a board of education can challenge the legality of an otherwise lawful strike on the insufficiency of internal branch affiliate procedures. The fact that the York County Board of Education framed its lock-out motion as it did does nothing to limit its right to impose a lock-out under the Act.

32. The Board's motion could arguably be construed as an undertaking, during bargaining, not to lock out its teachers if a memorandum of agreement was reached. A subsequent dishonoring at that undertaking might, given reliance and reasonable conduct by the Federation, be the basis of an allegation of bargaining in bad faith. But that is not an issue that is either before this Board or within its jurisdiction. It is entirely reserved to the Education Relations Commission (see s. 61(1)(f) of the Act).

33. For the foregoing reasons we must conclude that on September 4, 1979, when the Board of Education of York County allegedly locked out its high school teachers, it was lawfully entitled to do so. On that basis this complaint must be dismissed.

34. We are prompted by the evidence to make a further comment. Even if we had concluded that the Board did not have the right to lock out its teachers, we would nevertheless have dismissed this complaint on alternate grounds, based on the conduct of both parties. The teachers and Board of Education involved in this complaint are not new to bargaining warfare. The checkered history of their collective bargaining relationship is well recorded. In early 1974 they faced off in a bitter and costly strike that left 14,000 students without classes for forty-three days. That dispute, ultimately resolved by the passage of special legislation in mid-March of 1974, was among the most visible of a number of teacher-board confrontations in Ontario that led to the passage of the Act. (See Downie, *Collective Bargaining and Conflict Resolution in Education*, *supra*, pp. 42-5).

35. It appears from the evidence before us that both parties have some maturing to do. Their conduct towards each other demonstrates, on both sides, a greater interest in legal and bargaining finesse than in building a sound relationship based on mutual respect.

36. Having closely reviewed the verbatim transcript of the trustees' meeting, we must accept the submission of counsel for the Federation that the decision of the Board of Education to close the schools was not motivated by an opinion of its trustees that what then looked like a possible two day continuation of the work to rule would substantially interfere with the operation of the schools. We accept that a number of the trustees did have a genuine concern that an extended work to rule could prove intolerable from a pedagogical point of view. But that is not what moved them when they decided to close the schools for two days. The predo-

minant theme in the trustees' closed meeting was an exploration of how to respond to the teachers, how to show them, the students, and the public who was in charge. In our view that was a natural and legitimate reaction by a group of officials elected to discharge a public trust. But this Board cannot accept the submission of the Board of Education that its predominant motive was a purely administrative and pedagogical concern for the operation of the schools for the two days in question.

37. The trustees had before them written reports that overwhelmingly showed, as the evidence before this Board confirmed, that the first day of school had gone smoothly. Principals, teachers and students were demonstrating obvious co-operation and control. There was then no rational basis to expect any substantial difference in the next two days. At the meeting there was speculation by one of the supervisory officers that difficulties could develop as time passed. That was essentially a recognition that there could, in the next two days, be isolated cases where the occasional opportunist among the students might take advantage of the situation. In our view, that cautionary note could not reasonably be seen, and was not in fact seen, by the trustees as a prediction of widespread disturbances amounting to a substantial interference with the operation of the schools within the meaning of section 69(4)(c) of the Act.

38. To determine what motive was predominant it is necessary to separate, as near as possible, the concerns that the trustees had. If we ask ourselves whether they would have closed the schools if it meant that the teachers would receive full pay for the two days, we are satisfied that they would not. They were primarily reacting to a bargaining ploy and not to a perceived educational threat. The argument of the Board's counsel that the lock-out was prompted by a concern that the work to rule might last longer than two days is simply not true to the evidence. In the closed meeting no one expressed concern that with the schools open the teachers might not ratify the agreement within two days. The immediate concern, openly expressed, was whether closing the schools could precipitate a teacher backlash that would jeopardize ratification.

39. In a significant piece of testimony one trustee expressed a rationalization of the Board of Education decision that captures the gist of the argument made by his counsel. He stated that he and other trustees viewed their decision as an administrative and educational measure that yielded incidental, but secondary, collective bargaining advantages, which the Board of Education was of course happy to accept. While we do not challenge the altruism of that particular witness, this Board must, when assessing the critical motive of the entire group, listen to the whole symphony. In our view the prevailing theme was the opposite: the majority of the trustees voted to close the schools as a means of responding to the teachers; a secondary concern was whether the Board of Education's action would also be valid and defensible on pedagogical and administrative grounds. While it can sometimes be difficult to dissect and analyze the thoughts and motives of a public body like a Board of Education, in this case it is not. On the preponderance of the evidence this Board must conclude that the decision of the majority of the trustees to close the schools was primarily and essentially intended as an instrument of retaliation in bargaining with the teachers.

40. We would, therefore, find that the action of the Board of Education was a lock-out and not a closing of the high schools within the meaning of section 69(4) of the Act. Even if it

was an unlawful lock-out (a conclusion we expressly do not make for the reasons elaborated above) we would not, given the conduct of the Federation, make a declaration to that effect under section 68(1) of the Act nor make any remedial order as to wages lost under section 68(3).

41. This Board's authority to grant a declaration and compensation in the event of an unlawful lock-out under the Act is discretionary, just as it is under the like provisions of *The Labour Relations Act*. When either an employer or employees come before the Board requesting extraordinary relief in the event of an illegal strike or lock-out, before granting any relief the Board must look to the whole of the circumstances, including the conduct of the complaint. Where the party requesting relief has so conducted itself as to unduly provoke the act of which it complains, there may be no good industrial relations reason to grant it relief. On the contrary, there can be ample policy reasons not to. Our discretionary remedies should not be meted out in a way that unduly shelters a complainant by absolving it from the consequences of its own excesses. (*Northdown Drywall and Construction Limited*, [1972] OLRB Rep. June 666; and see also *Canadian Elevator Manufacturers*, [1975] OLRB Rep. Nov. 868 at 872-73).

42. "Excessive" is a fair word to describe the attitude and conduct of the Federation after its tentative agreement with the Board of Education was reached on September 3, 1979. We cannot accept the evidence of the Federation's representatives that they had no alternative but to keep the work to rule in full force until the tentative agreement was ratified. The teachers could have been concerned, as they testified they were, that if they had ended their strike by completely lifting the work to rule before ratification and ratification then failed, they would have to go through the supervised vote procedures and notice provisions of the Act again before resuming any strike action.

43. In our opinion, however, those concerns are more legalistic than realistic. They come as an after the fact rationalization of an ill-advised bargaining move. The teachers knew, or should have known, that they could wind down their work to rule to a level that would technically maintain their strike while inflicting minimal interference of the schools and students until the agreement was ratified. They could have given the Board of Education written notice to that effect. The Federation has already made a number of adjustments in the rules to accommodate the end of the school year in June, the summer school programme and the reopening of school in September. The teachers chose instead to play hardball. After a week-end of intense negotiations dedicated entirely to the work to rule issue, culminating in their undertaking, they knew, or should have known, that prolonging the full work to rule and failing to consider any real alternative at the teachers' meeting of September 4, 1979 must be taken as a slap at the Board of Education. The "safety motion", evidence that the teacher negotiators knew they had to come up with something, could only add insult and confirm the trustees in their conclusion that they had been misled.

44. There was no discernible collective bargaining purpose in the teachers' tactic of continuing to inflict a full work to rule after an agreement in principle had been reached. At that delicate time between making and ratifying a tentative agreement signs of goodwill and co-operation would have been especially important. Having chosen then to take a provocative stance the Federation should not now be heard to complain because the Board of Education reacted in kind. We would therefore not have exercised our discretion to grant a declaration to the Federation or compensation to its members.

45. For the purposes of clarity, our conclusions may be summarized as follows:

- (1) When the York County Board of Education closed its high schools on September 4 and 5, 1979 its action was not a closing within the meaning of section 69(4)(c) of the Act. It was a lock-out.
- (2) At that time, however, the Board was entitled to implement a lock-out, the necessary conditions in section 69(1) and (2) of the Act having been entirely met. The sufficiency of the Board's internal procedures does not affect its rights under the Act. The lock-out was lawful.
- (3) Even if we had concluded that the lock-out was illegal, we would not have so declared. The teachers took an unduly hard line in continuing a full work to rule after a settlement was tentatively reached. The lock-out was a predictable response to the teachers' actions and they should therefore not have the endorsement or benefit of declaratory or monetary relief from this Board.

DECISION OF THE BOARD MEMBER BRUCE K. LEE:

1. The decision of Vice-Chairman M. Picher accurately sets out the evidence received by the Board during several days of hearings in this matter, and I do not disagree with his basic findings of fact. However, my interpretation of those facts differs in many respects from his.

2. The teachers, in order to resolve the impasse which had arisen during the final negotiating sessions, gave an undertaking to the trustees that they would meet after school on September 4th, 1979 to consider the status of the work to rule sanctions which had been imposed. They also stated that the opening day of school would be "as normal a day as possible under the circumstances." On the evidence it is clear that little, if any, administrative work was performed on the first day of school but, as the Vice-Chairman's decision notes, that day's operation went fairly smoothly. Furthermore, the teachers did meet to consider lifting the work to rule sanctions and did pass a resolution which purported to ease those sanctions. Thus, in my view, the teachers had not contravened the undertakings they had given to the trustees.

3. I agree with Vice Chairman Picher in holding that the action taken by the York County Board of Education was unquestionably a lock out. The Board's primary motive in closing the schools after the first day, was to punish the teachers for what the trustees viewed as a breach of the undertaking which had been given to them prior to the opening day of school. In my opinion, the teachers lived up to their undertaking, that is they met after the first day of school to consider the work to rule sanctions and worked on the first day of school in a fashion which was as normal as possible in the circumstances, that is, the work to rule sanctions were still in place, and in any event, the opening day of school was not considered a normal teaching day.

4. While it may well be that the lock-out of the teachers was done in accordance with the provisions of the Act, if the lock-out was in fact illegal, I would have no hesitation in making such a declaration. The teachers were understandably concerned that a removal of the

work to rule sanctions prior to the ultimate settlement of their agreement may have jeopardized their legal ability to reintroduce those sanctions if no agreement had been concluded or ratified. Furthermore, the evidence relating to what had taken place during the meeting of the trustees leads to the inescapable conclusion that the trustees, by closing the schools and locking out the teachers, were interested in getting back at the teachers for continuing their work to rule sanctions. In my opinion, the actions of the school board were uncalled for. Had the lock-out been untimely and illegal, I would have had no hesitation whatever in making such a declaration.

DECISION OF BOARD MEMBER C. G. BOURNE:

The partial dissent of Mr. Bourne will be given in writing at a later date.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1980

BARGAINING AGENTS CERTIFIED DURING JUNE

No Vote Conducted

1527-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 249 (Applicant) v. R.L. Wilson Engineering & Construction Limited (Respondent).

Unit: "All carpenters and carpenters' apprentices in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1594-79-R: The Association of the Teaching Staff of Trent University (Applicant) v. Board of Governors, Trent University (Respondent).

Unit: "all faculty and professional librarian appointments at Trent University in Peterborough, save and except sessional faculty and professional librarian appointments teaching one and one-half courses or less, or equivalents, the President, Vice-Presidents, Deans, Associate Deans, Registrar, Associate Registrars, Assistant to the President, College Heads, either the University librarian or the Director of the library faculty members on the Board of Governors, and faculty and professional librarian appointments employed at Trent University for a term of two years or less while on leave from other employers." (192 employees in unit) (*Having regard to the agreement of the parties*). (*clarity note*).

2150-79-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. D. Kemp Edwards Limited (Respondent) v. Group of Employees (objectors).

Unit: "all employees of the respondent employed at its plant in Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and security guards." (36 employees in the unit). (*Having regard to the representations of the parties*).

2203-79-R: Canadian Union of Public Employees (Applicant) v. T.L.C. Manor Nursing Centre (Respondent).

Unit #1: "all employees of the respondent in the Town of Newmarket, Ontario, save and except the Administrator, Assistant Administrator and persons above the rank of Assistant Administrator, Head Cook and Head Housekeeper, Hairdresser, Registered Nurses, Secretary to the Director of Nursing, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (27 employees in the unit.) (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in the Town of Newmarket, Ontario, save and except the Administrator, Assistant Administrator and persons above the rank of Assistant Administrator, Head Cook and Head Housekeeper, Hairdresser, Registered Nurses, Secretary to the Director of Nursing, office and clerical Staff." (37 employees in the unit). (*Having further regard to the agree-*

ment of the parties).

2298-79-R: Canadian Union of Public Employees (Applicant) v. Chateau Gardens (Lancaster Inc.) (Respondent).

Unit #1: "all employees of the respondent at its nursing home at Lancaster, Ontario, save and except office, professional and medical staff, registered, graduate and under-graduate nurses, department heads, persons above the rank of department head, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period. (23 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: (See Bargaining Agents Certified No Vote Conducted - April 1980 [*Decisions May 1980*])

2418-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Koester Bennett Norgrove Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, persons above the rank of party chief, sales, office and clerical staff." (3 employees in the unit). (*Having regard to the representations of the parties*). (*clarity note*).

0005-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Joseph Rady-Pentek Limited (Respondent).

Unit: "all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, persons above the rank of party chief, sales, office and clerical staff." (2 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0084-80-R: United Steelworkers of America (Applicant) v. Resco Division WCI (Canada) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent company working in and out of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, outside sales staff and students employed during the summer vacation period." (19 employees in the unit).

0155-80-R: Canadian Paperworkers Union Local 212 (Applicant) v. Frank Sorensen Trucking Limited (Respondent).

Unit: "all employees of the respondent at Cornwall, Ontario, save and except foremen and persons above the rank of foreman." (7 employees in the unit).

0157-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Special Foundation Systems Company (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0183-80-R: Retail Clerks Union, Local 409 (Applicant) v. Fortsim Enterprises Limited (Respondent).

Unit: "all of the employees of the respondent in the Town of Fort Frances, Ontario, employed by the Rainy Lake Hotel, save and except Hotel Manager, Secretary, Bookkeeper, Bar Manager, Food Preparation Manager and persons above those ranks." (47 employees in the unit). (*Having regard to the agreement of the parties*).

0226-80-R: United Steelworkers of America (Applicant) v. Max Factor Canada, A Division of Norton Simon Canada Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, cafeteria employees, lab technicians, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (101 employees in the unit). (*Having regard to the agreement of the parties*).

0230-80-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 2155 Leanne Blvd., in the City of Mississauga, save and except hostesses and persons above the rank of hostess." (42 employees in the unit). (*Having regard to the agreement of the parties*).

0234-80-R: The Association of Professional Student Services Personnel (Applicant) v. The Metropolitan Toronto School Board (Respondent).

Unit: "all speech pathologists, (also called speech therapists), psycho-educational consultants, regularly employed by the respondent for not more than 24 hours per week, in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor or employees of the respondent employed in a confidential capacity in matters relating to labour relations." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0238-80-R: Labourers' International Union of North America, Local 506 (Applicant) v. Gold Structural Limited (Respondent).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0252-80-R: Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL, CIO, CLC (Applicant) v. Sisters of St. Joseph of the Diocese of London, Ontario, as Owner and Operator of St. Joseph's Hospital, Chatham, Ontario (Respondent).

Unit: "all employees of the respondent at St. Joseph's Hospital in Chatham, Ontario, regularly employed for not more than 24 hours per week, save and except professional medical staff, graduate pharmacists, undergraduate pharmacists, graduate dieticians, undergraduate dieticians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, chief engineer and persons covered by subsisting collective agreements." (50 employees in the unit). (*clarity note*).

0254-80-R: Employees Association of Procam Steel (Applicant) v. Procam Steel Products Limited (Respondent).

Unit: "all employees of the respondent in the Township of Westmeath, save and except foremen and persons above the rank of foreman, office and sales staff." (59 employees in the unit).

0260-80-R: Service Employees International Union, Local 183, AFL, CIO, CLC (Applicant) v. Belleville Plaza (Respondent).

Unit: "all maintenance and janitorial employees of the respondent in Belleville, Ontario, save and except supervisors, foremen, persons above the rank of supervisor and foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the representations of the parties*).

0273-80-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (UAW) (Applicant) v. Willow Manufacturing Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (56 employees in the unit). (*Having regard to the agreement of the parties*).

0296-80-R: Canadian Union of Public Employers (Applicant) v. The Municipal Corporation of The Township of Edwardsburgh (Respondent).

Unit: "all employees of the respondent in the Township of Edwardsburgh, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0312-80-R: Canadian Union of Public Employees (Applicant) v. Lindsay Board of Parks Management (Respondent).

Unit: "all employees of the respondent in the Town of Lindsay, save and except Administrator and office staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0320-80-R: Christian Labour Association of Canada (Applicant) v. Black Top Enterprises Limited (Respondent).

Unit: "all construction labourers, truck drivers and employees engaged in the operation of cranes, shovels bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in the County of Wentworth, including part of the Township of North Dumfries annexed from Beverly Township in the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0331-80-R: Construction Workers, Local #6, affiliated with the Christian Labour Association of Canada (Applicant) v. Schaible Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0334-80-R: United Steelworkers of America (Applicant) v. Port Colborne Quarries Limited (Respondent).

Unit: "all office and clerical workers of the respondent company in Port Colborne, save and except supervisors and persons above the rank of supervisor." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0337-80-R: The International Association of Machinists & Aerospace Workers (Applicant) v. Revco Limited (Respondent).

Unit: "all employees of the respondent in the Municipality of Metroplitan Toronto, save and except foremen and persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in the unit). (*Having regard to the agreement of the parties*).

0341-80-R: Service Employees Union, Local 204, affiliated with AFL, CIO, CLC (Applicant) v. Lewis Paper Wholesale Limited (Respondent).

Unit: "all employees of Lewis Paper Wholesale Limited in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, clerical and sales staff, field representatives, persons regularly employed for not more than 24 hours per week and students employed during school vacation period." (17 employees in the unit). (*Having regard to the agreement of the parties*).

0351-80-R: United Food & Commercial Workers International Union, Local 725 (Applicant) v. Pik-Nik Incorporated (Respondent).

Unit #1: "all employees of the respondent in Burlington, save and except assistant manager, persons above the rank of assistant manager, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (3 employees in the unit).

Unit #2: "all students employed during the school vacation period and persons regularly employed for not more than 24 hours per week in the employ of the respondent in Burlington, Ontario." (3 employees in the unit).

0354-80-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Pace John Construction Limited (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of 35 miles from the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0355-80-R: Association of Professional Student Services Personnel (Applicant) v. The Metropolitan Toronto School Board (Respondent).

Unit: "all psychologists, assistants to psychologists, speech pathologists (also called speech therapists), phychoeducational consultants employed by the respondent save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0362-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation 340 (Respondent).

Unit: "all employees of York Condominium Corporation 340, engaged in cleaning and maintenance at 362 The East mall, 364 and 366 The East Mall, and 2 Valhalla Inn Road, Islington, Ontario, including resident superintendents, save and except property managers, office and clerical staff and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0366-80-R: United Steelworkers of America (Applicant) v. Canadian Grinding Wheel Company (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Hamilton, save and except lead hands, foremen, persons above the rank of lead hand and foreman, office and sales staff and students employed during the school vacation period." (40 employees in the unit). (*Having regard to the agreement of the parties*).

0377-80-R: Construction Workers Local 52 affiliated with the Christian Labour Association of Canada (Applicant) v. Mirtren Contractors Limited (Respondent).

Unit: "all construction labourers, carpenters and carpenters' apprentices in the Townships of Elizabethtown, Augusta, and Edwardsburgh and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0378-80-R: Canadian Union of Public Employees (Applicant) v. Brock University (Respondent).

Unit: "all employees regularly employed for not more than 24 hours per week and students employed during the school vacation period in maintaining grounds, buildings, heating and refrigeration equipment; truck drivers, cleaners and cafeteria employees of Brock University at St. Catharines, save and except supervisors, security guards, students engaged in office and administrative departments, teaching personnel, academic technicians and office staff as defined and agreed." (8 employees). (*Having regard to the agreement of the parties*). (*clarity note*).

0381-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304 (Applicant) v. Laura Secord Division Ault Foods Limited Les Aliments Limitee (Respondent).

Unit: "all employees of the respondent at 115 Commander Boulevard, Agincourt, Ontario, save and except supervisors, persons above the rank of supervisor, quality control employees, office staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0395-80-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Dundas (Respondent).

Unit: "all office, clerical and technical employees of the respondent at the Corporation of the Town of Dundas, save and except the Clerk Administrator, Deputy Clerk, Treasurer, Assistant Treasurer, Recreation Director, Assistant to the Recreation Director, Clerk of Works, Tax Collector, department heads, office manager, secretary of the council committee, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (*Having regard to the agreement of the parties*). (*clarity note*).

0408-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Allport Investments Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 915 Midland Avenue and 921 Midland Avenue, Scarborough, Ontario, including resident superintendents, save and except property managers, office and clerical staff." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0410-80-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 285 Geneva Street, in the City of St. Catharines, Ontario, save and except hostesses and persons above the rank of hostesses and persons above the rank of hostess." (58 employees in the unit.) (*Having regard to the agreement of the parties*).

0415-80-R: Canadian Union of Public Employees (Applicant) v. The Board of Education for the Borough of York (Respondent) v. Group of Employees (Objectors).

Unit: "all lay assistants, food services assistants, and lifeguards employed by The Board of Education for the Borough of York, in the Borough of York, save and except persons employed for not more than 15 hours per week, students employed during the university, college or school summer vacation periods, and students on co-operative training programs." (134 employees in the unit). (*Having regard to the agreement of the parties*).

0418-80-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Travelways School Transit Limited (Barrie Division) (Respondent).

Unit: "all employees of Travelways School Transit (Barrie Division), save and except foreman, manager, persons above the rank of manager and office staff." (52 employees in the unit).

0386-80-R: International Union of Operating Engineers Local 793 (Applicant) v. V.S. Construction (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

Unit #2: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0427-80-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Applicant) v. Hudson's Bay Wholesale, A Division of Hudson's Bay Company (Respondent).

Unit: "all employees of the respondent at Ancaster, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0443-8-R: Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Around Town Trucking & Cartage (Respondent) v. Group of Employees (Objectors).

Unit: "All employees of the respondent working at and out of Brantford, save and except foremen, those above the rank of foreman and office staff." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0458-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Fred Schaeffer & Associates Limited (Respondent).

Unit: "all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, persons above the rank of party chiefs, sales, office and clerical staff, designers, inspectors, draftsmen, and students employed during the school vacation periods." (8 employees in the unit). (*Having regard to the agreement of the parties*).

0462-80-R: The Baycrest Social Service Staff Association (Applicant) v. The Baycrest Centre for Geriatric Care (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: "all social service employees in the employ of the respondent in Metropolitan Toronto, save and except department heads, and those above the rank of department heads, and those persons covered by subsisting collective agreements." (41 employees in the unit). (*Having regard to the agreement of the parties*).

0527-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Fernview Construction Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0528-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Conro Leasing Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

2467-79-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Sonic Transport Systems Limited (Respondent).

Unit: "all dependent contractors, (truck operators) who provide haulage service for the respondent in and out of the City of Mississauga." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	0	

2475-79-R: Labourers' International Union of North America, Local 527 (Applicant) v. Donalco Incorporated (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union 124 (Incumbent Trade Union).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent within the Counties of Peterborough, Northumberland, Hastings, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormont, Glengarry, Prescott, Russell, The Regional Municipality of Ottawa Carleton, Lanark, Renfrew and Prince Edward all in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of incumbent union	0	

0083-80-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Niagara (Respondent).

Unit: "all employees of the Regional Municipality of Niagara employed in their homes for Senior Citizens, regularly employed for less than 24 hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, office and clerical staff, registered and graduate nurses, persons employed under a co-operative educational training program and employees covered by subsisting collective agreements." (193 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		155
Number of persons who cast ballots	84	
Number of ballots marked in favour of applicant	75	
Number of ballots marked against applicant	7	
Ballots segregated and not counted	2	

0167-80-R: Canadian Paperworks Union (Applicant) v. Domtar Packaging, Corrugated Containers Division (Respondent) v. Printing Specialties and Paper Products Union, Local 466 (Intervener #1) v. International Union of Operating Engineers, Local 796 (Intervener #2).

Unit: "all employees of the respondent including maintenance staff, in the County of York, save and except foremen and foreladies, persons above the rank of foreman and forelady, Carlaw Plant stationary engineers, stock clerk, security officers, office staff and sales staff." (290 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		290
Number of names of persons on revised voters' list	289	
Number of persons who cast ballots	255	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	277	
Number of ballots marked in favour of intervener	27	

0186-80-R: Labourers' International Union of North America, Local 625 (Applicant) v. Eastern Construction Company Limited (Respondent) v. Local 494, United Brotherhood of Carpenters and Joiners of America (Intervener) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 345 (Incumbent Trade Union).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of Incumbent Trade Union	0	

0187-80-R: Labourers' International Union of North America, Local 625 (Applicant) v. Pigott Construction Limited (Respondent) v. The Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 345 (Incumbent Trade Union).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial commercial and institutional sector in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		1
Number of persons who cast ballots		1
Number of ballots marked in favour of applicant	1	
Number of ballots marked in favour of intervener	0	

0248-80-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Carleton University (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener).

Unit: "all stationary engineers and persons primarily employed as their helpers in the central heating plant of the respondent at Ottawa, save and except Chief Operating Engineer." (8 employees in the unit). (*clarity note*).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots		6
Number of ballots marked in favour of applicant	6	
Number of ballots marked in favour of intervener	0	

0249-80-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. United-Carr, Division of TRW Canada, Limited (Respondent) v. United Carr Employees' Association (Intervener).

Unit: "all employees of the respondent at Brantford, Ontario, save and except supervisors, persons above the rank of supervisors, office staff, design staff and quality control staff." (499 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		509
Number of persons who cast ballots		442
Number of spoiled ballots	4	
Number of ballots marked in favour of applicant	261	
Number of ballots marked in favour of intervener	177	

Applications Certified Subsequent to Post-Hearing Vote

0936-79-R: Local 663 of the Service Employees International Union AFL, CIO, CLC (Applicant) v. Trenton Memorial Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent at Trenton, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, chief engineer, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (31 employees in the unit).

Number of names of persons on revised voters' list		31
Number of persons who cast ballots		31
Number of ballots marked in favour of applicant	16	
Number of ballots marked against applicant	15	

2170-79-R: The Canadian Union of Public Employees (Applicant) v. The Cornwall & District Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors).

Unit #1: (*See Bargaining Agents Certified in Monthly Decisions March 1980*).

Unit #2: "all employees of the respondent at Cornwall, Ontario, employed for not more than 24 hours per week, and students employed during the school vacation period, save and except the Executive Director, Secretary to the Executive Director, Co-ordinator of Family Services, Group Home Manager, Manager of Life Skills/ARC Industries, Manager of Work Skills/ARC Industries, and Manager of Tri-County Developmental Centre." (6 employees in the unit). (*Having further regard to the agreement of the parties*).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	0	
Ballots segregated and not counted	1	

2401-79-R: Ontario Public Service Employees Union (Applicant) v. The Royal Ontario Museum (Respondent) v. The Joint Curatorial Council of The Royal Ontario Museum (Intervener) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except department heads, curators in charge and those above the rank of department head; secretary to the Board of Trustees; secretary to the Board Office; Executive Assistant to the Director; secretary to the Director; Researcher Special Projects; Administrative Assistant to the Associate Director-Curatorial; secretary to the Associate Director-Curatorial; Communications Systems Officer; secretary to the Assistant Director Education and Communication; secretary to the Assistant Director Administration & Facilities; all employees in the Financial Services and Personnel Services Departments; Accounting Systems Operator; Chief Designer; Secretary to: (1) Head of Support Services Department; (2) Head of Development and Membership Services Department; (3) Project Director; Supervisor Operations (Extension Services Department); Exhibit Programming Co-ordinator (EDSD); Production Co-ordinator (Publication Services Dept.); Co-ordinator Exhibit Production and Maintenance; Co-ordinator-OMSAS; Maintenance Supervisor (Support Services Dept.); Manager of Planetarium Operations; Production Supervisor (Planetarium); Physical Plant Co-ordinator (Project Office); Supervisor Buyer (Book & Gift Shop); Building Superintendent; Supervisor - Photography, Art and Audio-Visual Services; - members of Joint Curatorial Council; persons regularly employed for not

more than 24 hours per week, and students employed during the school vacation periods; persons covered by subsisting collective agreements between The Royal Ontario Museum and Local 204 of the Service Employees International Union." (249 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

Number of names of persons on revised voters' list		210
Number of persons who cast ballots		188
Number of ballots marked in favour of applicant	117	
Number of ballots marked against applicant	71	

2426-79-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Purity Zinc Metals Co. Ltd. (Respondent).

Unit: "all employees of the respondent working at Stoney Creek, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, lab technicians, persons employed for not more than 24 hours per week and students employed during the school vacation period." (49 employees in the unit).

Number of names of persons on revised voters' list		38
Number of persons who cast ballots		36
Number of spoiled ballots	2	
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	14	

2458-79-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Cara Drywall Services Ltd. (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 48 (Intervener).

Unit: "all plasterers, plasterers' apprentices and drywall tapers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots		9
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	2	

0131-80-R: Service Employees International Union, Local 183, AFL, CIO, CLC (Applicant) v. Balmoral Lodge Limited (Respondent).

Unit: "all employees of the respondent working not more than 24 hours per week, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and students employed during the school vacation period." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer		12
Number of names of persons on revised voters' list		11
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	3	

0263-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. 408225 Ontario Ltd., carrying on business under the name and style of McLean Bros. Fisheries (Respondent).

Unit: "all employees of the respondent working in Wheatley, Ontario, save and except foremen, persons above the rank of foreman, office staff, retail store employees, fishing boat crews, quality control inspectors, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (124 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		110
Number of persons who cast ballots	94	
Number of ballots marked in favour of applicant	67	
Number of ballots marked against applicant	27	

0313-80-R: Professional and Clerical Workers of Canada (Applicant) v. Canadian Union of Operating Engineers and General Workers, Local 101 (Respondent) v. Office and Professional Employees International Union, Local 343 OPSEU (Interested Party).

Unit: "all clerks and business representatives in the employ of the respondent." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	4	
Number of ballots marked in favour of interested party	0	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0037-80-R: Ontario Nurses' Association (Applicant) v. McKellar General Hospital (Respondent). (11 employees).

0110-80-R: Tilco Plastics Employees' Association (Applicant) v. Tilco Plastics (1976) Limited (Respondent). (135 employees).

0189-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Wheeler Surveyors (Respondent). (3 employees).

0210-80-R: London and District Service Workers' Union Local 220, SEIU, AFL, CIO, CLC (Applicant) v. St. Mary's General Hospital (Respondent) v. Group of Employees (Objectors). (52 employees).

0224-80-R: Service Employees International Union, Local 183, AFL, CIO, CLC (Applicant) v. Trent Valley Lodge Limited (Respondent). (35 employees).

- and -

0225-80-R: Service Employees International Union, Local 183, AFL, CIO, CLC (Applicant) v. Trent Valley Lodge Limited (Respondent). (3 employees).

0348-80-R: The Millwright District Council of Ontario United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494, 1007, 1425, 1592, 1669, 1916 and 2309 (Applicant) v. Gordon Wright Electric Limited (Respondent). (4 employees).

0352-80-R: Sudbury Printing Pressmen Local 590 (Applicant) v. Acme Printers (Respondent). (13 employees).

0409-80-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Queensway-Carleton Hospital (Respondent) v. Group of Employees (Objectors). (195 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1982-79-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Erie Technological Products Limited (Respondent).

Unit: "all employees of the respondent in Trenton, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (561 employees in the unit).

2398-79-R: Canadian Clothing, Headwear, Optical Plastic and Allied Workers Union (Applicant) v. H. D. Lee of Canada Limited (Respondent) v. United Garment Workers of America, Local 474 (Intervener).

Unit: "all employees of the respondent engaged in operating, pressing, shipping, receiving, stockkeeping operations and other general help (including mechanics), save and except for foremen, foreladies and persons above the rank of foreman, forelady, office and clerical and sales staff." (147 employees in the unit).

Number of names of persons on revised voters' list		147
Number of persons who cast ballots		141
Number of ballots marked in favour of applicant	56	
Number of ballots marked in favour of intervener	85	

0058-80-R: Christian Labour Association of Canada (Applicant) v. J. McLeod & Sons Limited (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union 508 (Intervener).

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices, pipefitters and pipefitters' apprentices, welders and welders' apprentices in the employ of the respondent in the industrial commercial and institutional sector of the construction industry within the following geographic areas: To the East - 5 miles of the 83 degree longitude; To the North - 49 degrees latitude line; To the West - Western limits of the Town of Marathon; To the South - International Boundary Line." (17 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	13	

0061-80-R: International Molders & Allied Workers Union (Applicant) v. Clarex Manufacturing Limited (Respondent).

Unit: "all employees of the respondent in the City of North York, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (50 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots	45	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	39	

0118-80-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598 (Applicant) v. Vanbots Construction Company Limited (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener).

Unit: "all cement masons and cement masons' apprentices in the employer of the respondent in the industrial, commercial and institutional sector in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note*).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener	2	

0174-80-R: United Steelworkers of America (Applicant) v. Emhart Canada Limited, Hill Refrigeration Division, (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical, technical and engineering employees of the respondent in Barrie, Ontario, save and except supervisors and persons above the rank of supervisor, sales and service personnel, secretary to the general manager, industrial nurse, students employed during the school vacation period and persons covered by the subsisting collective agreement between the applicant and respondent." (30 employees in the unit).

Number of names of persons on revised voters' list		25
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	15	
Ballots segregated and not counted	1	

0221-80-R: Christian Labour Association of Canada (Applicant) v. Joe Di Carmine Construction Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local Union 38 (Intervener).

Unit: "all carpenters and carpenters' apprentices employed by the respondent and working in the Regional Municipality of Niagara and the County of Haldimand save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener	2	

0223-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Rexdale Plastics Limited (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (37 employees in the unit).

Number of names of persons on revised voters' list		34
Number of persons who cast ballots		34
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	17	

0247-80-R: Christian Labour Association of Canada (Applicant) v. Joe Di Carmine Construction Limited (Respondent).

Unit: "all construction labourers employed by the respondent and working in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	2	

0293-80-R: Canadian Chemical Workers Union (Applicant) v. Brown Fintube Engineering Limited (Respondent) v. Heat Transfer Workers Union (Intervener).

Unit: "all employees of the respondent at its plant in St. Thomas, Ontario, save and except professional and supervisory employees, security guards, office and clerical employees and persons regularly employed for not more than 25 hours per week." (37 employees in the unit).

Number of names of persons on list as originally prepared by employer		37
Number of persons who cast ballots		37
Number of ballots marked in favour of applicant	18	
Number of ballots marked in favour of intervener	19	

Certification Dismissed Subsequent to Post-Hearing Vote

1850-79-R: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union (Applicant) v. Canterbury Foods Limited carrying on business as Crock & Block Restaurant and Tavern (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at Burlington, Ontario, save and except Assistant Managers and persons above the rank, Kitchen Managers, Bookkeepers, Management Trainees, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (28 employees in the unit).

Number of names of persons on list as originally prepared by employer		28
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	18	
Ballots segregated and not counted	1	

Unit #2: "all employees of the respondent at Burlington, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save except Assistant Managers, and persons above that rank, Kitchen Managers, Bookkeepers and Management Trainees." (43 employees in the unit).

Number of names of persons on list as originally prepared by employer		43
Number of persons who cast ballots	30	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	20	
Ballots segregated and not counted	3	

1934-80-R: International Beverage Dispensers and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, AFL, CIO, CLC (Applicant) v. Victoria Hotel (Respondent).

Unit #1: "all employees of the respondent employed in the dining room known as the "Old Vic" and "Muggs", located in the Victoria Hotel, Toronto, save and except managers, persons above the rank of manager, and persons regularly employed for not more than 24 hours per week." (3 employees in the unit).

Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	2	
Ballots segregated and not counted	1	

Unit #2: (See *Certifications Dismissed - Monthly Decisions February 1980*).

2302-79-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL, CIO, CLC (Applicant) v. Unitron Industries Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, research and development staff and students employed during the school vacation period." (69 employees in the unit).

Number of names of persons on revised voters' list		76
Number of persons who cast ballots	76	
Number of ballots marked in favour of applicant	26	
Number of ballots marked against applicant	50	

2446-79-R: Pharmacists and Professional Employees Association, Local Union 1976 Chartered by Retail Clerks International Union, CLC, AFL, CIO (Applicant) v. Erin Mills Lodge (Respondent) v. Group of Employees (Objectors).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted – Monthly Decisions April 1980.*)

Unit #2: "all employees of Erin Mills Lodge in Mississauga, regularly employed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office staff and students employed during the school vacation period." (8 employees in the unit). (*Having regard to the agreement of the parties.*)

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots		6
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	5	

0104-80-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Inter City Papers Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen, shipper, assistant shipper, those above the rank of foreman, shipper, assistant shipper, office and sales staff, cafeteria staff and students employed during the school vacation period." (56 employees in the unit).

Number of names of persons on revised voters' list		55
Number of persons who cast ballots		54
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	29	
Ballots segregated and not counted	5	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1821-79-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Acoustical Association of Ontario and The Interior Systems Contractors Association of Ontario (Respondent).

2427-79-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Titan Cartage Limited (Respondent) v. Group of Employees (Objectors).

0240-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Cutting & Coring Limited (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener).

0340-80-R: Hotel and Club Employees' Union, Local 299, Toronto, Ontario, of the Hotel and Restaurant Employees' and Bartenders' International Union (AFL, CIO, CLC) (Applicant) v. Cambridge Motor Hotel (Respondent).

0349-80-R: Canadian Union of Public Employees (Applicant) v. Guelph General Hospital (Respondent).

0364-80-R: Canadian Union of Public Employees (Applicant) v. Township of Innisfil (Respondent).

0379-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local No. 304 (Applicant) v. Laura Secord Division Ault Foods Limited, Les Aliments Ault Limitee (Respondent).

0459-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. McConnell Maughan Limited (Respondent).

0497-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenland Concrete Contracting (Respondent).

0517-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Coca-Cola Limited (Respondent).

0563-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tamar Construction (Respondent).

APPLICATION UNDER SECTION 1(4)

2434-79-R: The Lake Ontario District Council of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Spanway Building Systems Limited and Amorico Associates Limited (Respondents). (*Dismissed*).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

1499-79-U: Remi Bonin, David Charette, Robert McKerral, (Complainants) v. Inco Metals Company (Respondent). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1967-79-R: Ron Godin (Applicant) v. United Steelworkers of America (Respondent).

Unit: "all employees of Nordic Engine and Machine Limited, at Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff." (13 employees in the unit). (*Granted*).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots		14
Number of ballots marked in favour of respondent	5	
Number of ballots marked against respondent	7	
Ballots segregated and not counted	2	

1976-79-R: Dianne Bertrand (Applicant) v. Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Respondent) v. Nicholson's Restaurant, Steak House & Tavern (Intervener).

Unit: "all employees of Nicholson's Restaurant, Steak House & Tavern, in the Municipality of Pembroke, save and except manager, supervisors, office staff and persons employed for not more than 24 hours per week." (20 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	12	

2450-79-R: Hourly paid employees of Rehau Plastiks of Canada Limited, Prescott Plant (Applicant) v. International Molders and Allied Workers Union (Respondent) v. Rehau Plastiks of Canada Limited (Intervener).

Unit: "all employees of Rehau Plastiks of Canada Limited at Prescott, Ontario, save and except persons above the rank of lead head, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (41 employees in the unit). (*Granted*).

Number of names of persons on revised voters' list		42
Number of persons who cast ballots	39	
Number of ballots marked in favour of respondent	10	
Number of ballots marked against respondent	29	

0008-80-R: Lionel Rodgers, Tony Legacy, Edgar Ouimet, Donald Sutherland, Ernie Maguire (Applicant) v. United Steelworkers of America (Respondent) v. Don Valley Oxygen Limited (Intervener).

Unit: "all employees of Don Valley Oxygen Limited, in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (5 employees in the unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	5	

0026-80-R; Employees Cayuga Materials and Construction Company Limited (Applicants) v. Teamsters Local Union No. 879, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Cayuga Materials and Construction Company Limited (Intervener). (12 employees). (*Dismissed*).

0095-80-R: John Ludlow et al (Applicant) v. The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (Respondent) v. Howell Warehouses Company Limited (Intervener). (40 employees). (*Dismissed*).

0199-80-R: Mary Skeggs (Applicant) v. Commercial Workers Union Local 486 (Respondent). (21 employees). (*Withdrawn*).

0212-80-R: Pasquale Manzone (Applicant) v. Operative Plasterers' and Cement Masons International Association of United States and Canada, Local 345 and Ontario Provincial Conference of the Operative Plasterers' and Cement Masons International Association of United States and Canada and Operative Plasterers' and Cement Masons International Association of the United States of Canada (Respondents). (1 employee). (*Withdrawn*).

0214-80-R: Gerard Ledoux (Applicant) v. Operative Plasterers' and Cement Masons International Association of the United States and Canada, Local 345 and Ontario Provincial Conference of the Operative Plasterers' and Cement Masons International Association of the United States and Canada and Operative Plasterers' and Cement Masons International Association of United States and Canada (Respondent). (1 employee). (*Dismissed*).

0281-80-R: Employees of Dynamic Circuits Corp. Ltd. & Proto Circuits Ltd. Per C. Vanderleek (Applicant) v. Labourers' International Union of North America Local 837 (Respondent) v. Dynamic Circuits Corporation Limited and 418514 Ontario Limited Carrying on business as Proto Circuits (Intervener). (18 employees). (*Dismissed*).

0460-80-R: David L. Resnick (Applicant) v. The Retail Clerks International Association Local 206 (Respondent) v. Tip Top Tailors, 637 Lakeshore Blvd., Toronto, Ontario (Intervener). (7 employees). (*Withdrawn*).

0507-80-R: Toronto Auto Parks (Airport) Limited (Applicant) v. Canadian Union of Public Employees (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0440-80-U: Mechanical Contractors Association Ontario (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, and C. Burrows (Respondents). (*Granted*).

0516-80-R: Molson's Brewery (Ontario) Limited Toronto Brewery (Applicant) v. Those Persons Named in Schedule "A" To This Application (Respondent). (*Granted*).

0571-80-U: Butler Metal Products Company Limited, Cambridge, Ontario (Applicant) v. Those Persons Named in Schedule "A" To This Application (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

2364-79-U: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Interiors International (Respondent). (*Withdrawn*).

0300-80-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant). (*Withdrawn*).

0472-80-U: International Union of Operating Engineers, Local 793 (Applicant) v. E & E Seegmiller Limited, Harold Seegmiller and James Costigan, Steed & Evans Limited and Brian Barret, Waynco Limited, Paul Domianczuk and Wayne Heaman, Capital Paving Limited and Tom Taylor (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0813-79-U: Canadian Union of Public Employees (Complainant) v. Metropolitan Park Incorporated (Respondent). (*Withdrawn*).

0819-79-U: Kuldip Singh Samra (Complainant) v. United Glass and Ceramic Workers of North America, Local 200 (Respondent) v. Consumers Glass Company Limited (Intervener). (*Dismissed*).

1603-79-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and Local 636 (Complainant) v. Thomas Built Buses of Canada Limited (Respondent). (*Granted*).

1703-79-U: The Ontario Public Service Staff Union (Complainant) v. The Ontario Public Service Employees Union, Sean C. O'Flynn and Leon Farley (Respondent). (*Dismissed*).

1936-79-U: Ontario Taxi Association 1688, Canadian Labour Congress (Complainant) v. Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company (Respondent). (*Granted*).

1948-79-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Cayuga Materials and Construction Company Limited, Cayuga, Simcoe, Caledonia Division (including the Asphalt Plants and Quarry Operations) K & R Ready-Mix, Norfolk Ready-Mix, Seneca Ready-Mix and Lisa Truck Lines (Respondent). (*Withdrawn*).

2117-79-U: The International Woodworkers of America (Complainant) v. Mount Forest Caskets Limited (Respondent). (*Granted*).

2131-79-U: United Brotherhood of Carpenters and Joiners of America Local Union 2679 (Complainant) v. D. Kemp Edwards Limited (Respondent). (*Dismissed*).

2161-79-U: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (*Granted*).

2195-79-U: Service Employees Union, Local 204 AFL, CIO, CLC (Complainant) v. Doral Construction Limited and Michael Allen (Respondent). (*Granted*).

2196-79-U: Service Employees Union, Local 204, AFL, CIO, CLC (Applicant) v. Doral Construction Limited and Michael Allen (Respondents). (*Withdrawn*).

2198-79-U: Service Employees Union, Local 204, AFL, CIO, CLC (Applicant) v. Doral Construction and Michael Allen (Respondent). (*Withdrawn*).

2247-79-U: United Food & Commercial Workers International Union (Complainant) v. Sunnylea Foods Limited (Respondent). (*Granted*).

2342-79-U: International Woodworkers of America (Complainant) v. G. W. Martin Lumber Limited (Respondent). (*Granted*).

2365-79-U: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Interiors International (Respondent). (*Withdrawn*).

0043-80-U: Elmer Butler (Complainant) v. The URW Local 494, Mr. Wm. Love (Respondent) v. Firestone Canada Incorporated (Intervener). (*Dismissed*).

0081-80-U: Alex Bailey, Gary Kwiatkowski, Clarence Frigault (Complainants) v. United Brotherhood of Carpenters and Joiners of America (Respondent). v. York Hannover Developments Limited (Intervener). (*Dismissed*).

0125-80-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. G. T. Couriers 416656 Ontario Limited (Respondent). (*Granted*).

0146-80-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. National Dry Company Limited (Respondent). (*Withdrawn*).

0150-80-U: Labourers' International Union of North America, Local 183 (Complainant) v. Schaeffer & Reinthaler Limited (Respondent). (*Terminated*).

0177-80-U: Elias Hazineh (Complainant) v. Canadian Food and Allied Workers Local Union 175 and Miracle Food Mart Steinbergs Incorporated (Ontario) (Respondent). (*Withdrawn*).

0192-80-U: Teamsters Local Union No. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. VS Services Limited (Respondent). (*Withdrawn*).

0245-80-U: Mary J. Brennan (Complainant) v. Mr. Ulrich W. Uhlmann and Mrs. Marilyn Brooks of H. M. Stevens Company (Respondents). (*Withdrawn*).

0258-80-U: Mr. Iellimo Giuseppe (Complainant) v. The Built-Up Roofers' Damp & Waterproofers Sect. Sheet Metal Workers' International Association Local Union 30 (Respondent). (*Withdrawn*).

0267-80-U: Hotel and Restaurant Employees Union, Local 743, affiliated with the Hotel and Restaurant Employees and Bartenders International Union (Complainant) v. Holiday Inn, Windsor (Respondent). (*Withdrawn*).

0278-80-U: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Titan Cartage Limited (Respondent). (*Withdrawn*).

0288-80-U: Terence Wetten (Complainant) v. United Brotherhood of Carpenters and Joiners of America and Local #38 (Respondent). (*Withdrawn*).

0292-80-U: William Klemetski (Complainant) v. Printing Specialties and Paper Products Union Local 540 (Respondent). (*Withdrawn*).

0299-80-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. National Dry Company Limited (Respondent). (*Withdrawn*).

0301-80-U: London and District Service Workers' Union Local 220, SEIU, AFL, CIO, CLC (Complainant) v. Alexandra Hospital (Respondent). (*Withdrawn*).

0302-80-U: London and District Service Workers' Union Local 220, SEIU, AFL, CIO, CLC (Complainant) v. St. Raphael's Nursing Homes Limited (Respondent). (*Withdrawn*).

0319-80-U: International Brotherhood of Electrical Workers Local 636 (Complainant) v. The Hydro-Electric Commission of the Borough of Etobicoke (Respondent). (*Withdrawn*).

0333-80-U: Peter George (Complainant) v. United Steelworkers of America, Local 2859, Babcock & Wilcox Canada Limited (Respondents). (*Withdrawn*).

0336-80-U: Labourers' International Union of North America, Local 183 (Complainant) v. Bevan Contracting Limited (Respondent). (*Withdrawn*).

0350-80-U: United Rubber, Cork, Linoleum and Plastic Workers of America (Complainant) v. The Miner Company Limited (Respondent). (*Withdrawn*).

0367-80-U: Canadian Union of Operating Engineers and General Workers (Complainant) v. St. Vincent Hospital (Respondent). (*Withdrawn*).

0370-80-U: International Association of Machinists and Aerospace Workers, Local 485, 1120, and 1371 (Complainant) v. Abitibi Paper Company Limited (Fort William, Sault Ste Marie and Iroquois Falls Division), (Respondent). (*Withdrawn*).

0371-80-U: Ontario Nurses' Association (Complainant) v. St. Raphael's Nursing Home (Respondent) v. Mrs. Jennifer Shah (Grievor). (*Terminated*).

0372-80-U: David J. Sayles (Complainant) v. Harnden and King Construction Ontario Limited (Respondent). (*Withdrawn*).

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- and -

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- and -

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A Monthly Series of Decisions from the
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1818-79-R Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L. – C.I.O. – C.L.C. and its Local P287, Applicant, v. **Beef Terminal (1979) Limited**, Respondent, v. Beef Terminal Owned & Operated by Sterling Packers & Town Packers, Intervener.

Sale of a Business – Predecessor operating comprehensive packing house business – Some assets purchased by former employees – Successor operating slaughterhouse only – Whether part of a business transferred – Whether change in the character of the business

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members E. J. Brady and O. Hodges.

APPEARANCES: *Harold F. Caley and Stan Henderson for the applicant; Gordon Wood, J. Wilson and M. Kimber for the respondent; D. N. Corbett and D. F. Hirsh for the intervener.*

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES; August 8, 1980

1. The name “Beef Terminal 1979 Ltd.” appearing in the style of cause of this application as the name of the respondent is amended to read: “Beef Terminal (1979) Limited.”

2. This is an application under section 55 of *The Labour Relations Act*, in which the applicant union has also pleaded section 1(4) in the alternative. The union’s primary contention is that there has been a “transfer of a business” within the meaning of section 55 from “Beef Terminal”, a partnership owned and operated by Sterling Packers Ltd., and Town Packers Ltd. to “Beef Terminal (1979) Limited”. The application arises from a lease (with option to purchase) of certain premises and equipment formerly used by Beef Terminal in its packing house business. There is no dispute that Beef Terminal (1979) Limited has acquired the use of these assets; nor, having regard to the extended definition of the term “sale” in section 55 is there any doubt that the assets have been “sold” within the meaning of the Act. The sole question before the Board is whether the new company can be said to have acquired a “part” of the predecessor’s business within the meaning of section 55. In order to answer this question, it is necessary to set out something of the predecessor’s history and the business context in which it operated.

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3. Until the early 1960’s, Town Packers, Sterling Packers and a related company known as William Putty Beef, operated from the premises of the City of Toronto abattoir on Tecumseth Street. This abattoir was owned, operated and staffed by the City of Toronto; and provided custom slaughtering services to customers, including a number of small meat packing companies who leased space on the premises. Town, Sterling and William Putty Beef were among these tenants who operated from the Tecumseth Street location, buying, selling and shipping beef; using the slaughtering facilities provided by the City; and displaying and storing the meat, prior to the delivery in rented cooler space on the premises. In other words, the abattoir, and the meat companies, were engaged in separate, but functionally related businesses, carried on from the same premises.

4. In the early 1960's, Town, Sterling and William Putty Beef, moved to a new abbatoir location at 2225 St. Clair Ave. West, adjacent to the Ontario Stockyards. The arrangement at the new location was similar to that which existed at the City abbatoir, except that the three companies actually owned the slaughterhouse premises and were not merely tenants. As at the City abbatoir, each company had its own designated cooler, display, office, and docking facilities, and each maintained its own work force and separate identity. The three companies operated as independent competitors in the marketplace; (although they were related because of the family ties of their principals) and shared in the running of the slaughterhouse facilities. Phillip Greenspan, one of the principals of Town (and subsequently Beef Terminal) explained that the three companies jointly set up a "kill floor" to slaughter cattle on their behalf, hired staff, and shared expenses. The cattle slaughtering facility came to be known as "Beef Terminal", and while the evidence does not disclose the precise relationship between Beef Terminal Ltd. (another company owned by the Town/ Sterling interests) and the operation of the slaughterhouse known as "Beef Terminal", there is no doubt that the slaughterhouse itself was regarded by the three companies as an independent entity whose sole purpose was to run a "kill floor".

5. Beef Terminal as such did not purchase or sell cattle until November, 1977 when that name was adopted as the style for a partnership of Sterling and Town. By this time, the interest of William Putty Beef had been purchased by the other companies. A related holding company, known as Junction Holdings Limited, actually owned the land building and premises at 2225 St. Clair Ave. West. (There is no contention that the existence of this holding company has any significance, for it is clear that it was simply an instrumentality of Town and Sterling, and while an apparent party to the transactions with which we are here concerned, had no independent interest.)

6. The formation of Beef Terminal, a partnership owned and operated by Sterling Packers and Town Packers, created a new legal framework for what was already a comprehensive, fully integrated packing house business. It also resulted in a "sale of a business" determination by the Ontario Labour Relations Board under section 55 of *The Labour Relations Act*. The employees of Town and Sterling had been represented by different trade unions, and when the two companies formed the new partnership, and intermingled these employees, the Board found a "sale" within the meaning of section 55, and ordered a representative vote under section 55(6). This vote was won by the applicant union. The union was declared to be the bargaining agent for the employees of Beef Terminal (see the decision of the Board in Board File #1384-77-R, dated December 22, 1977); and subsequently, entered into a series of collective agreements, the most recent of which is dated February 5, 1979.

7. Beef Terminal ran a "comprehensive" packing house business of considerable size. At its peak capacity, the business slaughtered as many as 2,500 head of cattle per week and had annual sales exceeding \$75 million. The business employed a number of experienced cattle buyers who purchased livestock from stockyards and collection points throughout Canada, and a sales force who sold meat to the firm's customers. These customers included all of the major chain stores in Ontario, as well as processors (such as sausage producers) and purveyors who processed beef for the hotel, restaurant and institutional trade. The firm had its own fleet of trucks, drivers, garage, and mechanics, so that meat could be delivered to its customers. There were about 160 employees at the St. Clair Avenue location. Of these about 70 were in the companys' cooler areas, and about 52 worked on the kill floor. In addition there were truck drivers, operating engineers, salesmen, maintenance personnel, about 20 employees who

worked in the “boning room” preparing broken cuts, briskets, points, etc. for direct sale, as well as about a dozen employees working on meat remnants or by-products in the “fancy meat”, “blood-drying”, and “edible rendering departments”. Rendering of inedible by-products was done by Ontario Rendering, pursuant to contract, with equipment installed on the premises but owned and operated by Ontario Rendering.

8. It is unnecessary to describe in detail all of the functions performed by Beef Terminal’s employees or all of the operations associated with the slaughtering of cattle. For our purposes a general outline is sufficient. Cattle, purchased from the stockyards or elsewhere were conveyed to the abattoir’s premises (by rail, truck, and down the “runway” from the stockyards) marshalled in Beef Terminal’s barns, then taken to the “kill floor” where the cattle were slaughtered, the hide removed, and the meat was roughly dressed. The meat was stored temporarily in a “chill room” to reduce its temperature; then transported to the cooler areas where it was graded and displayed. Meat was received in the cooler areas on a “government inspected” basis and shipped to the customer’s order from adjacent loading docks.

9. The years 1978 and 1979 were difficult ones for the meat industry. During this period, nine packing houses closed. Beef Terminal’s own economic problems were exacerbated by Federal meat quotas, high interest rates, and cash flow problems related to the buying practices of large chain stores, which generated an unusually high (and expensive) level of accounts receivable. The company began to wind down its business as early as January, 1979. In early 1979, its trucking fleet was sold, its garage closed, and its mechanics were laid off. Trucks were leased on a “maintained basis” from Hertz. Meanwhile, the company was actively seeking to sell its business. A number of other large packers were approached (Beef Terminal was the second largest packer in Ontario), and agents were hired who canvassed potential buyers in North America and Europe. These efforts proved to be unsuccessful. Ultimately, the company decided that it would be unable to continue, and on April 23, 1979 advised the Minister of Labour that it planned to terminate its business. On April 26, 1979 the employees were notified that their employment would be terminated on June 22, 1979.

10. The shut-down proceeded in an orderly fashion. Notices were sent to customers, insurers, utilities, creditors, The Toronto Livestock Exchange, and businesses such as Hertz, which had outstanding service contracts which would have to be terminated. The last kill took place on June 18th. Thereafter, almost all of the employees were terminated except for a few who were kept on to dispose of existing stocks of meat, and maintain the sanitary condition of the plant. The company still hoped to sell a viable slaughterhouse operation, and this would be impossible if refrigeration and cleanliness were not maintained. Gunnar Bjarno, a maintenance man, Robert Ryan, an operating engineer, and J. H. Wilson, the plant superintendent, remained on the payroll until November, 1979. The company was also anxious not to prejudice the status of its “establishment number” – the registered trademark issued by the meat inspection department of the Federal Government, identifying the origin of the firm’s meat products and guaranteeing certain standards of sanitation, cleanliness, and inspection. The establishment number, as its name suggests, goes with the premises, but could be withdrawn if those premises ceased to meet inspection standards. Dr. Morris, an official of the meat inspection branch, explained that by having a viable establishment number, a company enhances both the value and marketability of its business; for it is much easier for a prospective buyer to take an *assignment* of an establishment number than to qualify for a new one. A plant may be idle for up to twelve months without prejudice; however during that period of time federal standards must be maintained.

11. When it became evident that the business of Beef Terminal would terminate, J. H. Wilson, the plant superintendent, began to explore ways in which the slaughterhouse could be purchased and carried on as a "custom slaughterhouse" – that is, a slaughterhouse serving resident and non-resident customers in much the same way as the City abbatoir used to do; or more recently, as Town, Sterling, and William Putty Beef were serviced prior to the creation of the partnership in 1977. Wilson had considerable experience in the business. He had been employed by Beef Terminal and its predecessors for ten years and had previously been superintendent of a cooperative packing house in Barrie owned and operated for the benefit of about 2,000 farmers. Wilson believed that a custom slaughterhouse, selling its services for a fixed charge per head slaughtered, but not purchasing any of its own cattle, could avoid the necessity of an extensive business infrastructure (i.e. salesman, buyers, transportation facilities etc.), and could avoid the risks associated with the purchase and sale of cattle, and the cash flow problems endemic to the sale of meat to chain stores. Wilson explored his idea with Gunnar Bjarno, the mechanical foreman, John Thomson, the livestock manager, and Robert Ryan, an operating engineer. These three Beef Terminal employees, authorized Wilson to explore the possibility of financing the enterprise. Subsequently the number of Beef Terminal employees involved grew to nine.

12. Wilson approached a number of financial institutions and government agencies seeking capital; but it soon became evident that no funds would be forthcoming unless the employees themselves had substantial capital. Beef Terminal placed a value on the slaughterhouse assets of more than \$5 million, and it was clear that the employees would never be able to raise a large enough proportion of that sum to attract support from the lending institutions. Wilson then began to investigate the possibility of leasing all of the assets for a period of years with an option to purchase. In this way he hoped to demonstrate the viability of the enterprise, and to generate from profits a sufficient equity position to attract financial support from institutional lenders. The list of employees involved eventually grew to forty, – all but three of whom were employees of Beef Terminal. Each of these employees contributed funds from his own resources. None of the funds backing the business, which eventually became Beef Terminal (1979) Limited were derived from Beef Terminal (although in late October 1979 certain sums were paid from Beef Terminal to the principals of Beef Terminal (1979) Limited, in order to raise the premises to U.S. inspection standards, and in this sense Beef Terminal contributed a modest amount to Beef Terminal (1979) Limited's start-up costs).

13. There followed a period of hard bargaining between Wilson and his associates and the owners of Beef Terminal. The employees had amassed about \$100,000 of their own funds, and were anxious to conclude an arrangement which did not require significant further funding. Beef Terminal, on the other hand, was anxious to sell all of the equipment associated with the slaughterhouse, and sought to strike a good bargain for itself, with a significant down payment and a reasonable monthly rental. Eventually, the parties concluded an agreement satisfactory to all of them. The precise terms of this arrangement are not relevant to our section 55 determination. It is sufficient to note that the transaction took the form of a lease with option to buy and as a result thereof the new business acquired the use of the building and all of the equipment previously used by the predecessor in the abbatoir aspect of its business. The new business also required the use of certain vacant pieces of land adjacent, or in close proximity to the abbatoir, which it used for parking; and a parcel of land known as the "stock-yark option property" which is adjacent to the premises but is currently owned by the Ontario Stockyards, and was subject to an option in favour of Beef Terminal. There was no acquisi-

tion of accounts receivable, or customer lists, nor was there any express acquisition of goodwill, or a non-competition covenant. The business did assume certain service agreements respecting photocopying machines, fork lifts and the weigh scales then in place. The signs affixed to the company premises remained as they were, bearing the Beef Terminal name.

14. Beef Terminal (1979) Limited was incorporated in October, 1979. The nine initial prime movers behind the organization owned all of the preference shares, and retained control over the business by virtue of electing a majority of the Board of Directors. The rest of the forty "employees/ owners" only own common shares. Wilson testified that he considered them to be "owners" rather than employees, but it would appear that they are paid a salary and are subject to the control and direction of "management". Apart from their investment (amounting to about \$3,000 each), all of these employees are in approximately in the same position, vis-a-vis their employee status as they were when they worked for the predecessor. The employee status of these individuals also appears to be recognized of articles 24 and 25 of the shareholders' agreement which provide as follows:

"Member shareholders shall at all times be employees of the company, and further agree to form an association or union properly established under the laws of the Province of Ontario, including the election of required representatives, and cause the association to enter into a collective bargaining agreement with the company excepting those employees whose position of employment precludes such persons from such membership. Such association shall hold meetings regularly and provide one representative deemed elected by the common shareholders to be a member of the Board of Directors of the company.

The persons named in Schedule A hereby agree that the foregoing clauses 22, 23 and 24 are mandatory and constitute the qualifications for holding the said sharehold interest benefits and employment personally, and directly or indirectly through the said corporate interest to be provided by them, as the case may be and any departure from any of the foregoing requirements or conditions shall forthwith end all the foregoing rights and interest of such employee or his company, subject to repayment to him of the value of the financial interest and employee termination benefits as hereinafter set out."

These paragraphs not only presuppose the employee status of the individuals working in the new business but would seem to compel them, on pain of forfeiting their interest in the company, to form a union which would subsequently enter into a collective bargaining agreement with their employer. Whatever else may be said of these provisions, they clearly envisage the employee status of the "owners", as well as a process in which they will negotiate their terms and conditions of employment with their employer. Collective bargaining was not regarded as inappropriate. Wilson testified that he never contemplated maintaining the existing bargaining relationship or collective agreement, although it is clear that he was aware of the predecessor's bargaining relationship, and must be taken to be aware of the possibility that obligations in connection with that relationship might arise subsequent to the transaction with Beef Terminal (1979) Ltd. Article 25 of the agreement with the predecessor entitled "Agreement of Option to Purchase and Purchase and Sale" provides:

“COLLECTIVE AGREEMENT – RELEASE BY PURCHASER

The Purchaser acknowledges that The Amalgamated Meat Cutters and Butcher Workmen of North America and its Local P21-17 and The Canadian Union of Operating Engineers and General Workers collectively referred to as the ‘Unions’), respectively, held bargaining rights as at June 22, 1979 pursuant to *The Labour Relations Act* (the ‘Bargaining Rights’) for certain of the Vendor’s employees and that the Vendor was a party to collective agreements (the ‘Collective Agreements’) with the Unions with respect to the above-mentioned Vendor’s employees. The Purchaser hereby releases, premises and forever discharges the Vendor from or in respect of any claim or action which it may now or hereafter have against the Vendor in respect of any and all proceedings, lawsuits, judgments, awards, damages, loss, orders, decrees, actions, causes of action, or claims which may at any time be asserted against the Purchaser by an employee, union, the Unions or any third party with respect to any matter arising on or subsequent to October 29, 1979 by reason of or related to the Bargaining Rights or the Collective Agreements.”

The new company did not notify the trade union that the abbatoir would recommence operations nor were any of the union officials, committeemen, or shop stewards invited to participate as “employee/owners”.

15. Once the new business had established its legal and financial framework, and acquired the predecessor’s assets, Wilson was able to attract four “resident” and one “non-resident” customer for whom the company would provide slaughtering services. None of these customers has any financial interest in Beef Terminal (1979) Limited, nor were they directed to that company by the predecessor. Beef Terminal (1979) Limited persuaded these new customers that it could provide a better service than that provided by Metropolitan Packers where, apparently, the same form of tenant/servicing arrangement is available. The tenants are small meat firms with a steady business, based upon ethnic customers. Their business does not fluctuate like that of the chain stores and since they pay a service charge per head slaughtered, there are no significant accounts receivable. As has already been mentioned, Beef Terminal (1979) Limited does not buy or sell beef, but merely supplies slaughtering and cooler services on a maintained basis. A monthly fee covers the cost of rent and maintenance; and the service charge covers the cost of slaughtering.

16. Beef Terminal (1979) Limited now employs approximately 40 employees – most of them on the kill floor. Because it is a service organization which does not own its own beef, there is no cooler staff (other than maintenance personnel), truck drivers, mechanics, purchasing agents, or sales staff. At the time of the hearing there were no boning room, “fancy meats”, or edible rendering operations; although it is by no means clear that such operations could not begin again once the company is firmly established in its main business. The new company acquired the necessary equipment, and Wilson told the Board that certain renovations had been made in the basement in contemplation of new business initiatives. The relationship with Ontario Rendering in respect of the inedible rendering products is being maintained as it was with the predecessor company. Wilson estimated that when the business is fully operational, processing (slaughtering) charges will account for 50 per cent of its revenues, rent for 15 per cent, and the disposal of remnants 35 per cent. Wilson noted,

however, that the disposal of remnants portion of the business is not yet fully developed, so that currently rent and slaughtering charges make up a much larger proportion of its total revenues. The estimated kill in the first year is 1,000 head per week; and in the second year is 1,600 head per week. Although not as large as the predecessor in its busiest periods, this is nevertheless a significant number. The actual slaughtering process, the equipment, and many of the employees remain essentially the same as when the predecessor operated the abattoir. Cattle owned by the resident tenants are brought to the kill floor, slaughtered, kept temporarily in the chill room, then passed to the tenants in an inspected/approved condition, for display and sale in the tenants' cooler areas.

17. The functions performed by Beef Terminal (1979) Limited for its customers are essentially the same as those provided by the same slaughterhouse facility to Sterling, Town and William Putty Beef in the years prior to 1977. At that time, it will be recalled, the three companies operated as independent business entities, each occupying separate cooler space on the premises, and having their slaughtering done by a slaughterhouse jointly owned by them. As Phillip Greenspan told the Board, Wilson's idea is not "something new", but rather "something old". In an effort to minimize their risks and financial commitments, Wilson and his associates have adopted a business form not unlike that of the city abattoir (or the co-op packer with which Wilson was associated in Barrie) and functionally very similar to the operation of the slaughterhouse prior to the creation of Beef Terminal in 1977. Wilson acknowledged that this was the case although he pointed out that, at that time, Beef Terminal was a "tool" of the other three companies. On the other hand, there is no doubt that Beef Terminal (1979) Limited has not acquired the total business of Beef Terminal, nor is it even operating the slaughterhouse at the level operated by Beef Terminal in its busiest periods. The new company simply lacks the financial resources, expertise, personnel and general economic organization, necessary to operate the kind of comprehensive packing house business run by the predecessor. As Phillip Greenspan candidly remarked: "if Beef Terminal (1979) tried to do so, it wouldn't last two weeks". The issue before this Board, however, is not whether Beef Terminal (1979) has acquired *all* of the business of the predecessor. Section 55 also continues bargaining rights when there has been a "sale" of "part" of the predecessor's business. The question before the Board therefore is: Has Beef Terminal (1979) Limited acquired a "part" of the predecessor's business within the meaning of section 55? If it has, the trade union's bargaining rights and collective agreement continue insofar as they are applicable to that part.

II

18. This case raises an interesting question concerning the intended meaning of the phrase "part of the business" appearing in section 55 of the Act; but before addressing this central issue, it may be useful to briefly review the purpose of section 55 and the Board's general approach to its interpretation. The relevant parts of the statute are as follows:

"55. (1) In this section,

- (a) 'business' includes a part or parts thereof;
- (b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective

agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application."

19. The effect of section 55 is abundantly clear. When a business, or a part thereof, is transferred or disposed of, the union retains bargaining rights for the employees employed in the "like unit" to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement to its employees until the Board otherwise declares. Sections 55(4) and 55(6), give the Board certain limited powers, *inter alia*, to define the "like unit" and redefine the bargaining structure so as to eliminate conflict in bargaining rights, but the section operates automatically to continue bargaining rights in their existing form until the Board otherwise declares. The purpose of section 55 has recently been discussed by the Board in *More Groceteria Ltd.*, [1980] OLRB Rep. Mar., in a long passage to which we might usefully refer:

"15. Section 55 of *The Labour Relations Act* is a very important part of the legislation guarding against the subversion of acquired collective bargaining rights and providing some permanence to them in an otherwise volatile commercial context. In the former respect, it is assisted by the various unfair labour practice sections of the *Act* together with section 1(4) which permits the Board to treat as one employer a business carried on through more than one corporation where there is a common control or direction and whether or not these businesses are being carried on simultaneously. An interesting early example of this unfair labour practice aspect of the provision can be found in the important *Thorco Manufacturing Limited* (1965), 65 CLLC ¶16,052 case, a case that today could be just as fairly dealt with under section 1(4). However, this purpose of the provision is not applicable in the facts at hand. We are satisfied that the relationship between the respondent(s) and Loblaws has been arms length and there is no evidence that the subject commercial transactions were other than for bona fide business purposes.

16. Unfortunately, however, the latter function of the section – providing some permanence to collective bargaining rights – is often the most difficult to apply. Here the Legislature has determined that the objectives of labour relations policies require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by protection to the employees from a sudden change in the employment relationship. Indeed, the transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees and their representatives are assured of some real measure of continuity in the collective bargaining process by operation of law. So strong is the basis to this

policy that the Supreme Court of the United States arrived at a similar conclusion without the benefit of a specific statutory provision like section 55. See *John Wiley & Sons Inc. v. Livingston* (1964), 376 U.S. 543, 84 S. Ct. 909; Goldberg, *The Labour Law Obligations of a Successor Employer* (1969), 63 N.W.L. Rev. 735; Note, (1966), 66 Col. L. Rev. 967; Note, (1969), 82 Harv. L. Rev. 418. This ongoing nature of collective bargaining agreements underlines again that such documents are not “ordinary contracts” nor are they in any real sense the simple products of consensual relationships. See *McGavin v. Toastmaster Ltd. v. Ainscough et al.*, [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1, Laskin, C.J.C. It is against these impressive policy considerations that the Board must give meaning to and apply section 55.

17. The fundamental issue in cases of this kind is the threshold determination of the section: Has a business been sold? The term ‘sells’ is defined to *include* ‘leases, transfers; and any other manner of disposition.’ This all-embrasive definition obviously reflects the labour relations policy considerations discussed generally above. To repeat, collective bargaining rights are not to be treated as co-extensive with commercial ownership and, to this extent, labour law policy seeks to insulate industrial relations from disruption by necessary and inevitable interaction in the market place. The term ‘business’, on the other hand, is simply defined to *include* ‘a part or parts thereof’. No similar exhaustive definition was attempted by the Legislature in recognition, we think of the great diversity in commercial affairs and the resulting need for a case by case elaboration of the term in the light of labour law policy. A brief perusal of the many factual situations giving rise to the Board’s jurisprudence bears testimony to the wisdom of this legislative choice. Accordingly, at the outset of reviewing a few of the cases that have applied the term ‘business’ in the context of retail food stores, it should not be surprising to learn that the Board in determining whether a business has been sold has not deferred to the commercial documentation employed; has not been influenced by the use of intermediary agents to effect transfers; and has not made simple distinctions between asset and business dispositions. Rather, it has tried to make workplace assessments with respect to the continuity of a particular enterprise, activity, or service arriving at conclusions that a court of law in a commercial matter might not arrive at, but conclusions which are fair to both the statute and context under review. See *Gordons Markets* (decision of the Divisional Court of Ontario, unreported, November 21, 1978). This we understand to be the main purport of the following excerpt taken from *R. v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.*, (1969), 3 D.L.R. (3d) 41 (B.C. S.C.) at page 52 per Dryer J.

‘The importance of the ‘business’ in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors, such as whether the [ir] jobs are being performed at the same or substan-

tially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.”

20. Most of the cases under section 55 involve an alleged sale of “a business”; and only a few consider the possible meaning of the words “part of a business”. The Board has found a sale of part of a business where one of a chain of retail stores has been sold to a competitor (*Supercity Discount Foods*, [1970] OLRB Rep. April 118; *Loblaws Groceterias Ltd.*, [1973] OLRB Rep. Jan. 73); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Company Limited*, [1970] OLRB Rep. Jan. 1244) and where there was a transfer of the oil burner installation and service branch, of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Limited*, [1971] OLRB Rep. May 515). In *British Columbia Provincial Council, United Fishermen and Allied Workers Union and Central Native Fishermen's Co-operative et al.*, [1977] 1 Can LRBR 329, the British Columbia Labour Relations Board found that there had been a sale of a “part of a business” when a cannery which was part of a larger business organization was sold to a fishermen’s co-operative. The Board declined to cancel the union’s certification because it found that, notwithstanding the fact that the workers shared in the profits of the operation, they nevertheless carried out their day-to-day work functions in essentially the same manner and under similar direction as they had done when the operation was owned and run by the predecessor company.

21. In *Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508 and in *Alcan Building Products Limited*, [1968] OLRB Rep. May 212, the Board dealt with business situations which have a number of similarities to the one presently before us. In *Canac* the predecessor was engaged in the manufacture of a variety of product lines, most of which were related to the automobile industry. Its operations were divided into a number of departments. One of these was the shock absorber department, which employed approximately 20 per cent of the predecessor’s total production personnel. The predecessor’s corporate parent decided to liquidate the predecessor’s business, and the shock absorber portion of that business was transferred to Canac which, *inter alia*, leased machinery, equipment, tools, and that portion of the premises used the predecessor (Acme Screw and Gear) to produce shock absorbers. The resulting situation was described by the Board as follows (at paragraph 22):

“Canac is presently engaged in the production of shock absorbers, and to that extent is carrying on part of the business formerly operated by Acme. The operation takes place in the same area of the plant as was used by Acme in the production of shock absorbers. The superintendent of the Acme shock absorbers department, and 11 or so other supervisory staff of that company, occupy similar posts in the new company. Canac is, in effect, the shock absorber department of Acme Incorporated, but otherwise continuing in much the same manner before incorporation.”

In *Canac*, the Board found a sale of part of the predecessor’s business and held that the union’s bargaining rights were preserved. In *Alcan Building Products Limited*, a corporate entity was engaged in the production of aluminum products and carried on business through separate divisions, each of which had its own employee complement and produced a variety of product

lines. For economic reasons, a decision was made to discontinue one of these divisions. The successor acquired the premises and some of the equipment used by the predecessor (the rest being disposed of to unrelated purchasers), retained a few of the former employees, and continued to produce two products which had accounted for only a small proportion of the predecessor's total production. The Board nevertheless found a sale of "part of the predecessor's business".

22. In each of the cases to which we have referred, the Board found that the predecessor had transferred a coherent and severable part of its economic organization – managerial or employee skills, plant, equipment, "knowhow" or goodwill, – thereby allowing the successor to perform the economic functions formerly performed by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them, were preserved. The part of the predecessor's business which it no longer wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. In all of these cases there was a transfer of a distinct part of the predecessor's configuration of assets and no material change in the character of the work performed by employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, the skills of employees, and the functional coherence of the employee complement; and, but for section 55 the established bargaining and collective agreement rights would have been lost. This was the very mischief to which section 55 is directed, and the Board was satisfied on the evidence in each case that it should be applied.

23. In the present case, it is not contended that Beef Terminal (1979) acquired "the business" of Beef Terminal in its totality; but it did acquire the use of all of the land, buildings and equipment formerly used by Beef Terminal (including certain stockyard option properties and parking areas) as an abattoir, and this acquisition permitted the new company to carry on the custom slaughterhouse business from which its revenues are derived. Apart from certain renovations which had to be done by the new company, it is difficult to find in its organization anything which cannot be traced directly to the predecessor. Many of the service contracts and business arrangements were maintained (for example with Ontario Rendering and Toledo Scales) and, of course, there is no real change in the character of the work. A significant portion of the employee and supervisory complement has been preserved and continues to perform substantially the same job functions as were performed for the predecessor. If there had been a substantial change in the essential attributes of the employment relationship, or fundamental differences in the character of the severed portion of the predecessor's business, such that continued representation by the trade union would seem inappropriate or unreasonable, the Board might be less inclined to infer a transfer of part of the predecessor's business within the meaning of section 55; but such is not the case. Indeed, the shareholders' agreement itself recognizes the functional coherence and community of interest of the employee group, because it purports to compel them to form a new trade union to bargain a collective agreement regulating their terms and conditions of employment. In the circumstances, it is difficult to attach much significance to the fact that the employees also have an equity interest in the business, for their employer has clearly recognized their employee status, and the appropriateness of maintaining a collective bargaining relationship. It might also be noted that many of the collective bargaining rights of the predecessor's employees, including their rights respecting seniority, promotion and layoff, were prescribed on a departmental basis

and would not appear to be unworkable in the new context. We are satisfied moreover that the facts of this case clearly exhibit the “mischief” (i.e. the erosion of bargaining rights) to which section 55 was directed.

24. We are further satisfied that Beef Terminal (1979) continues to slaughter cattle very much as before, and we do not attach much weight to the fact that it is now supplying its services to different customers (i.e. serving a different market). This will frequently be the case where the predecessor is an integrated operation which, prior to the transfer provided its own market for the output of the department, division, or subsidiary transferred. The fact that the severed portion can exist as a separate entity, and can develop and serve its own market is not insignificant; but it is not determinative of the application of section 55. A business is not synonymous with its customers (or its employees for that matter) and it would be an unusual sale of a business transaction in which the new owner did not put his own imprint on the undertaking acquired from the predecessor. If the new owner had not thought that he could do so the transaction would not have occurred in the first place. Of more significance in this case is the historical evidence before the Board. This evidence demonstrates that prior to 1977, the slaughtering facilities, assets and equipment, were used to provide a service to Town, Sterling (and formerly William Putty Beef) which is very similar to that now provided by Beef Terminal (1979) Limited to its resident tenants. Town, Sterling and William Putty Beef, each maintained its separate identity in the marketplace, occupied its own separate cooler space, and carried on business with its own customers in a manner not unlike Beef Terminal (1979) Limited's current tenants. The slaughterhouse facility was regarded as a distinct operation which was set up to serve the three related companies who also had a form of tenancy relationship (with Junction Holdings apparently being the actual owner of the real property). This arrangement was also similar to that which Sterling, Town and William Putty Beef had when they were tenants at the City abattoir. In the circumstances, it is difficult to accept that the abattoir cannot be considered as a coherent and severable portion of the predecessor's total undertaking, which, once severed and transferred, can properly be regarded as a “part of the predecessor's business” within the meaning of section 55. We might also note that there was not a lengthy hiatus period between the departure of the predecessor, and the transfer to the successor of the land, premises and equipment at 2225 St. Clair Ave. West. Some of the key employees who subsequently became the first principals of Beef Terminal (1979) Limited remained employed by Beef Terminal until November, 1979 to maintain the licensed status of the premises and enhance its value as a saleable entity. The establishment number – a registered trade mark – was acquired and maintained; and after the transfer the new company continued to use containers, labels and packaging bearing that number. The number was generally recognized and accepted in the industry. While the respondent contended that the name meant nothing, we cannot accept that the name “Beef Terminal” was entirely valueless. It had been associated with a successful business and the respondent maintained the signs bearing that name. It is also interesting to note that Beef Terminal (1979) Limited must change its name to a dissimilar name of the termination of the lease for any reason or the expiry of the lease, if the option to purchase is not exercised. While undoubtedly this provision is designed primarily to protect the principals of Beef Terminal, who may wish to re-enter the business at some time in the future and recapture any goodwill associated with the name “Beef Terminal”, we are not persuaded that the respondent receives no advantage from its association with the predecessor and continued use of its name.

25. The Board is satisfied, after carefully considering the totality of the evidence, that there has been a sale of part of the business of Beef Terminal, to the respondent, Beef Terminal

(1979) Limited. Moreover, we do not think there has been a substantial change in the character of the transferred part of the predecessor's business so as to merit the exercise of the Board's discretion under section 55(5) to terminate the union's bargaining rights. Accordingly, the Board declares that Beef Terminal (1979) Limited is the successor of Beef Terminal, must continue to recognize the applicant's bargaining rights in the "like unit" to that which existed prior to the transfer, and must continue to apply the collective agreement *mutatis mutandis* to that unit. Town, Sterling, Junction and Beef Terminal were engaged in related activities under common control and direction, but there is no evidence that Beef Terminal, and Beef Terminal (1979) Limited are under common control and direction. Accordingly, the union's application under section 1(4) of the Act is dismissed.

DECISION OF BOARD MEMBER E. J. BRADY:

I have now had the opportunity of considering the decision of my colleagues in this matter. I agree that there has been a "sale" of "part" of the predecessor's business to Beef Terminal (1979) Ltd. It is also clear however, that the new company is operating in an entirely different financial and market context. In my view, the successor has significantly changed the character of the business so that it is substantially different from the business of the predecessor. Accordingly, I would exercise the discretion vested in the Board under section 55(5) of the Act to terminate bargaining rights.

2425-79-U Albert Mills, Ray Peters, James Shaughnessy, Salvatore Fryia, Roger Wilson, Gerhard Gross, Edwin Sherk, Roger McQuade, Ivan Mills, John Murdoch, Complainants, v. **The Canadian General Electric, Respondent.**

Duty to Bargain in Good Faith – Parties – Section 79 – Individual complainants seeking relief alleging violation of section 14 – Union not party – Whether having standing to bring complaint – Whether individual rights under pension plan proper subject for complaint against employer in absence of Union

BEFORE: George W. Adams, Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *Richard J. Taylor, Albert Mills, and others for the complainants; Edward T. McDermott and J. Reynolds for the respondent.*

DECISION OF THE BOARD; August 5, 1980

1. This is a complaint brought under section 79 of *The Labour Relations Act* alleging a violation of section 14. What is interesting or novel about the case is that the complaint is brought by ten employees of the respondent company who are members of the United Electrical, Radio and Machine Workers of America (hereinafter referred to as "the union"). It

is admitted on behalf of the complainants that the trade union is their exclusive bargaining agent and that the complaint is not being brought on the trade union's behalf. Moreover, the trade union was not named as a party respondent and counsel for the complainants expressly disclaimed any interest in adding the trade union as a respondent. This being the case the respondent company, by way of a preliminary motion, seeks to have the complaint dismissed on the basis that the complainants lack the legal standing to bring a complaint alleging a breach of the bargaining duty. Before considering the respondent's argument in this respect and the complainant's reply, a brief review of the background of this complaint, as agreed to by the parties, is useful.

2. The complainants allege that they have been dealt with by the respondent contrary to section 14 and request:

- (a) that the Board direct the respondent to bargain in good faith and negotiate the terms of the pension plan between itself and the individual employees in good faith; and
- (b) that the Board direct that the collective agreement between the respondent and trade union be re-negotiated with respect to the provisions dealing with the "voluntary" portion of the pension plan.

3. The particulars on which the complaint is based are set out at paragraphs 4 to 7 of the complaint:

"4. The following is a concise statement of the nature of each act or omission complained of:

On or about the time and period of negotiations for a collective agreement between the said Respondent and United Electrical Workers, the said Respondent acted in bad faith and *breached its trust obligations made between itself and the various Complainants* which arose out of and by virtue of a pension plan negotiated and agreed upon between the respective parties. The Complainants allege that the Respondent acted contrary to the provisions of Section 14 of *The Labour Relations Act*.

5. No action has been taken on behalf of the Complainants for the adjustment of the matters giving rise to the complaint apart from representations to the Pension Commission of Ontario.

6. The Complainants as set out in paragraph 1 are affected by the complaint in that they are each a member and entitled to the benefits which have accrued under the pension plan agreement between their trade union and the Canadian General Electric.

7. Other relevant statements:

The Pension Plan noted in the above application does not directly form part of the collective agreement, but is constituted and included in a

memorandum of agreement formulated between the Company and the United Electrical Workers.

Each of the Complainants made voluntary contributions to that part of the pension plan known as the voluntary plan. In negotiating with the United Electrical Workers for a new collective agreement, it was proposed that the existing pension plan be substantially amended and altered. The proposed alteration would have violated the trust provisions formulated between each of the individual employees who made voluntary contributions, and the Respondent over the last twenty-seven years.

It is alleged by the Complainants that the Company acted in bad faith in failing to recognize and acknowledge that each individual contributor to the voluntary portion of the existing pension plan had made a private and expressed agreement directly between themselves and the Company in reference to benefits which have accrued or did accrue under the plan. By failing to acknowledge its direct contractual relationship with each individual employee in reference to this particular plan or portion thereof, it acted in bad faith in continuing to negotiate with the Trade Union without representations being made directly to each of the individual contributors.

It is further alleged by the Complainants that the Respondent has bargained improperly, and there has been an unfair impairment of the pension benefits which have accrued under the voluntary portion of the old plan.

It is further stated by the Complainants that the Respondent *failed to provide the Complainants or any individual employee enrolled in the voluntary portion of the Plan with the appropriate information for proper bargaining.*

It is further stated that the Respondent *failed to provide the Trade Union, United Electrical Workers, with the proper information in respect to the negotiation of the new proposed Pension Plan.*" [emphasis added]

4. The complainants are individual employees of the respondent at its Peterborough location which employs 2,600 employees. The trade union was certified as bargaining agent in 1946 and collective bargaining with the respondent company now embraces twelve other locations (and locals of the trade union) involving 6,000 employees. The most recent agreement was entered into on December 24, 1979 and it is the treatment of pensions in this round of bargaining which, as the complaint shows, has given rise to this complaint.

5. A pension plan, apparently company-wide, has been in effect since the early 1950's. But as was the case in the "early days" of many collective bargaining relationships in this Province, the relationship between the pension plan and collective bargaining was uneasy. See

generally Adams, *Bell Canada and the Older Worker: Who Will Review the Judges?* (1974), 12 Osgoode Hall L. J. 389. The trade union apparently asked for a basic non-contributory plan in 1953 to replace what was described as a very "slight plan" existing before then. The respondent company refused the request and, over the trade union's objection, introduced a compulsory contributory plan. However, the trade union took no steps to have the plan set aside and thus the plan was continued through the 1950's with various modifications and with employees making contributions into a fund known as the Canadian General Electric Pension Trust. The respondent company matched these employee contributions.

6. In 1960 the trade union, apparently for the first time, played an active role in reforming this pension plan. Out of its involvement emerged what has been referred to as a "dual plan." One part was a so-called "basic plan" to which only the respondent company contributed and which entitled employees to certain defined benefits on their retirement having regard to a number of conditions and qualifications relating to age, service and earnings. Several modifications to this basic plan through collective bargaining were made over the years. A second part of the plan as reformed was a "voluntary introductory plan." In addition to the benefits available under the basic plan, an employee was able to receive additional benefits on his retirement by making contributions under this portion of the pension plan. Presumably, this part of the plan was a remnant of the initial compulsory contributory plan, but, whatever its history, benefits under this plan were defined in terms of service and employee contributions. This second part of the plan was also modified many times over the years through collective bargaining. Indeed, because of the apparent Canada-wide nature of the plan, the amendments must have been negotiated with several trade unions. However, the matter before the Board involves only that aspect of the plan applicable to the respondent's collective bargaining relationship in Ontario with this trade union – a relationship applying to its Davenport, Scarborough, Trenton, Royce, Ward Street, Port Union, Peterborough, Carboloy, Caledonia, Burlington, Dufferin Lamp, Guelph and Barrie plants. An example of an amendment to the plan through this collective bargaining relationship prior to the most recent collective agreement was a memorandum of agreement dealing with pensions for the 1977-79 collective agreement. This memorandum is brief and worth setting out in full to give the flavour of how previous amendments have been handled between the parties.

"MEMORANDUM OF AGREEMENT – PENSIONS

This Memorandum of Agreement between the Canadian General Electric Company Limited and the United Electrical, Radio and Machine Workers of America, and its Locals 507, 508, 509, 515, 516, 519, 524, 526, 533, 537, 541 and 545, representing certain employees of Davenport, Scarborough, Trenton, Royce, Ward Street, Port Union, Peterborough, Carboloy, Caledonia, Burlington, Dufferin Lamp, Guelph and Barrie Plants of the Company sets out the basis of settlement agreed to in the matter of Pensions as follows:

The amendments to the 1976-77 Pension Agreement referred to in the Company's settlement offer dated January 18, 1978 as "Canadian General Electric Pension Plan – Amendments" are attached hereto as Appendix P-1. A new Pension Agreement between the parties, of which the new Pension Plan will form a part, will be prepared by the Company to incorporate the said amendments.

All the terms and conditions of the 1976-77 Pension Agreement and the amended Pension Plan referred to therein except as modified in accordance with the above will be continued unchanged. The new Pension Agreement will be signed by the parties upon completion of preparation of the text.

APPENDIX P-1

PENSION PLAN

Amend the Canadian General Electric Pension Plan as follows:

Effective January 1, 1978, extend the scaled basic formula (\$6.20 – \$9.00 per month per year of credited service) to include credited service to December 31, 1977.

Effective January 1, 1979, extend the scaled basic formula (\$6.20 – \$9.00 per month per year of service) to include credited service to December 31, 1978.

Effective January 1, 1979, increase the current supplemental payment to \$6.00 per month per full year of credited service beginning at 10 years and up to a maximum of 30 years credited service.”

7. A copy of the Canadian General Electric Pension Plan as amended January 24, 1978 and as it existed prior to its amendment in the latest round of negotiations (Exhibit 3) was also introduced into evidence. Obviously, it is a lengthy and complex document. But a few excerpts from it should be reproduced.

Section I, paragraph (1), entitled “Eligibility and Participation”, provides:

“Each employee in service on January 1, 1959, and each employee entering service after that date and after acquiring 52 weeks of service credits may participate in the Plan to the extent of benefits provided by it for service on the after that date (hereinafter referred to as “future service”) by completing an ‘Application for Participation’ card in the form prescribed by the rules of the Pension Board as in effect from time to time and at his option making contributions thereunder in the manner and to the extent specified in Section II.

An eligible employee has the choice of participating in the Plan, either to the extent of the Basic Pension Benefits described in Section IV for which benefits no employee contribution is required or to the extent of such Basic Benefits plus the Additional Pension Benefits described in Section IV towards the cost of which benefits the employee is required to contribute.”

Section II is entitled “Contributions” and paragraphs (1), (4) (7) & (8) provide:

“(1) Except as hereinafter provided, each eligible employee who

elects through enrollment to participate in the benefits provided by the Plan for service on or after March 12, 1974, shall make the following contributions with respect to each payment of compensation to him:

- (a) No contributions are required for the Basic Pension Benefits;
- (b) His contributions for the Additional Pension Benefits, provided he elects to enroll for such Benefits in addition to the Basic Pension Benefits, shall be at the rate of 1% of his compensation;
- (c) An employee enrolled for Additional Pension Benefits may increase such Benefits by contributing, in addition to the above, at the rate of 1%, 2%, 3%, 4%, or 5% of that portion of his compensation which is in excess of the Year's Maximum Pensionable Earnings in effect from time to time under the Canada Pension Plan and the Quebec Pension Plan (\$10,400 in 1978).

(4) A participating employee may discontinue further contributions at any time but no amounts contributed may be withdrawn so long as the employee remains in the service of the Company.

(7) The Company shall contribute each year (a) the actuarially determined cost of future service benefits under the Plan for such year, taking into account employee contributions, prior Company contributions, and actuarial experience as the Company deems appropriate; (b) such amount applicable to the cost of unfunded past service benefits under the Plan as the Board of Directors may determine; and (c) such amount applicable to the cost of any amendments to the Plan in respect of service prior to their effective dates as the Board of Directors may determine.

(8) Contributions shall be made and pension funds invested or loaned in such a manner as to comply with any applicable laws, rules or regulations that may have been or shall be adopted or promulgated by a governmental authority having jurisdiction over the Fund or Plan."

Section IV is entitled "Amount of Pension at Normal Retirement Date" and contains an extensive description of benefits provided under both the basic and contributory provisions of the plan. The basic monthly pension is expressed in terms of a yearly credit for service multiplied by a fixed dollar amount depending on an employee's final five year average earnings. The additional pension benefits arising out of the contributory portion of the plan is expressed, with various exceptions, as 40% of the total contributions made to the plan. There are many other features of the thirty-six page plan including provisions dealing with supplemental payments, disability, survivorship, payments on termination of employment, vesting, etc. But, the only other provisions we wish to reproduce are Sections XVII (Management of Pension Funds and Liability for Benefits); XVII (Amendment or Suspension); and XXI (General Conditions), paragraph (4). They provide:

“SECTION XVII

MANAGEMENT OF PENSION FUNDS AND LIABILITY FOR BENEFITS

(1) To implement the Plan the Company has heretofore created the Canadian General Electric Pension Trust. Said Trust is for the purposes of:

- (a) Holding and investing all contributions to the cost of the Plan made by the Company and by the employees on or after July 1, 1953, and all contributions made by the Company before that date and
- (b) Making, or providing for, payment of all pension and other benefits provided by the Plan. Such payment shall be made solely from the funds of the Pension Trust and the Company shall have no obligation to make or continue from its own funds any payment of the pension and other benefits provided by the Plan.

(2) Employee contributions shall be paid to the Pension Trust currently and Company contributions shall be paid to such Trust in accordance with the provisions of Section II.

SECTION XVIII

AMENDMENT OR SUSPENSION

(1) The Board of Directors may amend and Plan at any time and from time to time and the power of the Board of Directors to make such amendments shall be without limitation except as stated in paragraph (2) of this Section.

(2) Subject to the sufficiency of the funds in the Trust, no amendment of the Plan, except an amendment of the termination provisions set forth in Section XIX, shall adversely affect to a material degree:

- (a) The pension of any employee who retired under the Plan prior to the date such amendment becomes effective,
- (b) The pension, computed to the date of amendment, of any employee whose pension right vested prior to the date of such amendment, or
- (c) Any benefits provided by the Plan in respect of service on or after July 1, 1953, which are based on employee contributions made prior to the date of such amendment.

(3) The Board of Directors may suspend or reduce, for any period or periods, the payment of Company contributions to the Trust on account of future service benefits provided employee contributions are correspondingly suspended or reduced for a concurrent period or periods. However, no such suspension or reduction of contributions shall affect the rights of participating employees to benefits based upon service rendered or contributions made prior to the date such suspension or reduction becomes effective.

(4) If any applicable legislation should be enacted which provides or requires benefits similar to those described in this Plan, appropriate modification will be made in the provisions of the Plan.

SECTION XXI

GENERAL CONDITIONS

(4) No participating employee and no other person shall have any legal or equitable rights or interest in the Plan or in the funds of the Plan that are not expressly granted in the Plan. Participation in the Plan does not give a participant any right to be retained in the service of his employer. The right and power of the Company to dismiss or discharge any employee is expressly reserved."

8. The parties are agreed that the new collective agreement between the parties effectively terminates the voluntary contributory part of the pension for the future and inserting in its place a substantially enhanced basic non-contributory pension plan which provides employee benefits on the basis of years of service and average earnings over a specified period. The respondent has guaranteed to the trade union (and affected employees) that no employee receives less under the new plan than the total benefits that had accrued under the old plan. Thus, no employee has actually lost any accrued benefit and, indeed, the vast majority of all employees (including the complainants) will receive improved benefits. All employees who had contributed to the plan will have their contributions remain in the plan, with interest accruing, and on their retirement this money will be used for a money purchase pension. The Board was advised that all contributors will get greater benefits than non-contributors but this advantage is not the same for all contributors because they contributed in different amounts and at different times.

9. At the outset of bargaining the respondent had made a proposal on pensions to the trade union involving two options. Option one was the maintenance of the existing plan with improvements to its two aspects. It proposed an increase to the wage related basic non-contributory scale from \$6.20 to \$9.00 per month per year of service to \$7.80 to \$10.60 per month per year of service. Pension benefits from contributions made from 1974 to the end of 1979 were to be increased from 40% of contributions to 50%. Changes with respect to "vesting" rights were also proposed. Option two was the introduction of the new single non-contributory plan involving a wage related benefit scale based on a final three year earnings average. After negotiations with the trade union which resulted in some modifications to the detail of this latter option the union and company agreed to option two. A document prepared by the

respondent company and circulated to employees after the signing of their memorandum of agreement, but before the employee ratification vote, described the new pension arrangement in the following terms:

"PENSION PLAN

Effective January 1st 1980, the company will implement a new Basic non-contributory pension formula. The new formula will provide an earnings-related, monthly flat-rate benefit for all years of past and future credited service. This new plan will replace the present Basic non-contributory plan. The benefit levels of the plans are set out below.

Present Plan		New Plan	
Five-year average Annual earnings	Monthly benefit X years	*Three-year average Hourly earnings	Monthly Benefit X years
Less than \$8,000	\$6.20	Less than \$6.00	\$ 9.60
\$ 8,001 to 8,500	6.60	\$6.01 to \$6.50 per Hr.	10.40
8,501 to 9,000	7.00	6.51 to 7.00 "	11.20
9,001 to 9,500	7.40	7.01 to 7.50 "	12.00
9,501 to 10,000	7.80	7.51 to 8.00 "	12.80
10,001 to 10,500	8.20	8.01 to 8.50 "	13.60
10,501 to 11,000	8.60	8.51 to 9.00 "	14.40
11,001 or more	9.00	9.01 to 9.50 "	15.20
		9.51 or more "	16.00

* Under the new plan there is a choice of 3-year average or 5-year average hourly earnings, whichever produces the highest monthly benefit. Service for first year of employment will also be credited.

In conjunction with the implementation of the new plan, contributions to the present Additional Plan will cease for future service. The sum of individuals' contributions plus credited interest will remain in the Pension fund where it will continue to accumulate interest (currently at 7 per cent) until that individual's retirement date. At that time, the total accumulated will be used to provide additional pension income in the form of an annuity. Payroll deductions presently being made for contributions can, in future, be placed in the CGE Supplementary Pension Plan (savings and investment options) to buy additional annuity income, or a worker can contribute to group or personal Registered Retirement Savings Plans. Under the new plan each worker is guaranteed a pension in excess of what he would have under the present plan up to December 1979.

Supplemental payments (\$6.00 per month per year of service presently) will be increased to \$7.00 in 1980, \$8.00 and \$9.00 per month per year in 1982.

Vested pension right will be after 10 years of credited service (presently 15 years or 10 years at age 40).

Below are examples of pensions under the present and proposed new plans:

Lowest paid worker in UE Bargaining unit:

	Present Plan non-contributory	New Plan non-contributory
1980	\$8.60 per month x years	\$ 9.60 per month x years
1981	9.00 per month x years	10.40 per month x years
1982	9.00 per month x years	12.00 per month x years

Worker at Tool & Die Rate – Maximum contributions to Additional Plan (\$5,848.) 30 years service.

	Present Plan	New Plan
Non-contrib. Basic 30 x \$9.00 = \$270/mo.		30 x \$13.60 = \$408
Additional Pension = 272/mo.		Annuity (contr. + int.) 187/mo.
1980 Total 542/mo.		595/mo.

In 1981 at wage increases in proposed agreement, new plan would produce:

30 x 15.20	= 456/mo.
Annuity est.	= 200/mo.
Total	656/mo.

In 1982 the new plan would produce:

30 x 16.00	= 480/mo.
Annuity est.	= 214/mo.
Total	694/mo.

It will be seen that as earnings increase, the amount of the flat monthly benefit also rises in relation to the scale. Longer service also increases the monthly pension amount."

10. For the respondent company it is submitted that the complaint must be dismissed because the complainants lack standing, in law and in policy terms, to bring it. It is submitted that the employer owes a duty "to bargain in good faith and make all reasonable efforts to enter into a collective agreement" to the trade union holding exclusive bargaining rights to represent the employer's employees. Counsel submits that in the facts at hand the respondent company honoured this obligation as evidenced by the consummation of a collective agreement but, in any event, only the trade union representing the complainants for the purposes of collective bargaining could bring the instant complaint and it has not seen fit to do so. Counsel further submits that no qualification to this principle can be made for the complainant's claim of individual pension rights because the pension plan, as a matter of law, must constitute part of the collective bargaining agreement between the company and trade union and is subject, therefore, to the trade union's exclusive authority. On this branch of his argument, counsel relied upon numerous cases including *Syndicat Catholique de Employés de Magasins de Quebec Inc. v. La Compagnie Paquet Ltée.*, [1959] S.C.R. 206; *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718; and *Winnipeg Police Association et al. v. City of Winnipeg et al.*, [1979] 5 W.W.R. 193. It was submitted that while this Board might be able to review the trade union's representation of the complainants in light of their claims, this could only be done if the complainants had alleged a violation of section 60 of *The Labour Relations Act* and joined their trade union as a party respondent. This they specifically have declined to do.

Alternatively, counsel for the respondent company submitted that, if their claimed pension rights could exist “outside” the collective agreement, any such agreement would be outside the collective bargaining process and could not be involved in a breach of *The Labour Relations Act*. In broad policy terms counsel submitted that a company must measure its own bargaining position against the trade union’s understanding of the legal duties owed to it. If that trade union is satisfied with the company’s bargaining performance, there ought to be no opportunity for anyone else to challenge the company’s bona fides and bargaining efforts. Counsel asserted that the trade union bargaining with a company is in the best position to know whether that company is living up to its legal responsibilities under the legislation. Counsel therefore asked the Board to exercise its discretion under section 79 and refuse to inquire into the complaint.

11. For the complainants it was argued that, as a result of the contested pension amendments, the respondent company is going to use contributions made by employees over the last twenty-seven years to fund the new plan. He submitted that these contributions were made with the expectation of receiving benefits as a consequence. The amendments mean, counsel submits, there was no reason for all the employees who made voluntary contributions over the years to have made those contributions. It was submitted that, in law, the company cannot change the plan and use monies already contributed into the plan in any way other than was originally agreed to unless it does so with the unanimous concurrence of all affected contributing employees. In support of this proposition the Board was referred to *International Brotherhood of Boilermakers et al. v. Yarrows Ltd.* (1963), 39 D.L.R. (2d) 470 (B.C. S.C.). Accordingly, counsel submitted that the amendment to the pension plan was not within the legal capacity of the trade union and company without involving all the affected employees by obtaining their unanimous approval. He argued that their failure to do so amounts, in the circumstances, to a breach of section 14 and in this unique situation the complainants should be accorded an independent legal interest and standing under section 14. Finally, it was submitted that the complainants were prepared to establish that the company had made a material misrepresentation to the trade union in negotiating the pension modifications. While this allegation was brought to the trade union’s attention before the collective agreement was finalized and it refused both to alter its course of conduct and bring a complaint to the Board, counsel submits that his clients ought to be allowed to pursue their allegation. He submitted that if they are not allowed to do so, the company will have been allowed to bargain in bad faith, contrary to an express policy of the statute.

12. We have reviewed the evidence as agreed to and the helpful submissions of counsel and have concluded that this complaint must be dismissed. Regardless of what rights the employees may or may not have according to the law of trusts, this Board is satisfied that they have no proper claim under section 14 of *The Labour Relations Act* on the allegations made and that their claims ought not to be inquired into under section 79.

13. Section 14 reads:

“The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.”

Sections 13, 15, 35, 37, and 42, together with the scheme of the Act reflected in many other

provisions, make it clear that the parties to a collective agreement are the employer and the trade union, although the employees in the defined bargaining unit are undoubtedly bound by the agreement. See for example *Re Governing Council of the University of Toronto and Service Employees Union, Local 204* (1974), 5 L.A.C. (2d) 304 (Weatherill). Thus, on the clear words of the statute, we are of the view that the obligations and duties contained in section 14 are matters of legal interest only to these parties.

14. At the basis of modern collective bargaining legislation in North America is the recognition by employers of properly selected trade unions as the exclusive bargaining agents of employees. Employers are obligated to deal with such trade unions and with them alone. There is no opportunity for the employer to enter into direct dealings with employees so represented without the trade union's consent. The relationship of individual rights to collective bargaining has been reviewed in a number of important judicial opinions of high authority and the following lengthy excerpt taken from the decision of the Manitoba Queen's Bench in the *Winnipeg Police Association* case, *supra*, captures the sense of and reviews a number of these cases. In that matter the Winnipeg Police Association took exception to an agreement between a constable and the Deputy Chief of Police that the constable would attend law school while working part-time as a police officer. In setting aside the agreement, the Hewak J. wrote:

"As a result, if the document is to be considered an 'agreement' or 'contract of employment, then of course it is necessary to consider the law governing this genre of contract.

Generally speaking, the law recognizes that where there exists a collective bargaining agreement it is not open to individual members of the bargaining unit or to the employer to enter into separate employment agreements.

Laskin C.J.C. (then Prof. Laskin, Q.C.), in a presentation delivered to the annual conference of the Personnel Association of Greater Winnipeg on 22nd March 1963, entitled 'Collective Bargaining and Individual Rights' (1963), 6 Can. Bar Journal 278 at 280-81, had this to say on the subject:

'The Union is perforce a principal party, and correlatively as its bargaining authority is exclusive so is the bargaining right of individual employees precluded. Neither prior individual agreements nor subsequently struck private bargains can stand against a union-employer collective agreement, save as such agreement may permit, and this it rarely, if ever, does. Indeed, collective bargaining legislation in the fairly common pattern in which it exists in Canada makes the collective agreement binding on the employee as well as upon the union and the employer. Nor is there any possibility of arguing that an individual may freely bargain on such matters as are not covered by a collective agreement, although they might be susceptible to inclusion if only union and employer could agree. I doubt whether in this country we would follow the American principle that an individual may treat with his employer on matters not embraced in the collective agreement, at least until the union

asserts its exclusive bargaining rights. With us, a collective agreement once struck settles the bargain between the parties for its term, and there is no continuing obligation to bargain on matters which were either dropped or not brought forward. But this hardly supports a right to individual bargaining, although it may leave the employer free to confer benefits not provided for in the collective agreement.

Even if it be the case that the individual has some freedom to negotiate outside the limits of the collective agreement, it will not be very significant. The individual's interests are best protected at the bargaining table through his chosen representative spokesman, and it is there that collective strength needs to be marshalled. In striking a bargain for all individuals who are or may come into the bargaining unit, the union and employer establish a set of employment conditions that cannot be tailored to individual preferences. There is little, if any room, for private deals.'

This same question was reviewed by the Supreme Court of Canada in the case of *Syndicat Catholique des Employés de Magasins de Québec Inc. v. Cie. Paquet Ltée.*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346. There, Judson J., writing for the majority of the court at pp. 353-54, expressed the concept in the following terms:

'The union is, by virtue of its incorporation under the Professional Syndicates' Act [R.S.Q. 1941, c. 162] and its certification under *The Labour Relations Act* [R.S.Q. 1941, c. 162A], the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes. The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all.'

This view of the law was also articulated by the Supreme Court of Canada in the case of *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 75 CLLC ¶14,277, 54 D.L.R. (3d) 1, 4 N.R. 618.

Laskin C.J.C., speaking for the majority of the court in that case, made the following statement at pp. 448-49:

'The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications

which arise by reasons of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto. To quote again from the reasons of Judson J. in the *Paquet* case, *supra*, at p. 214:

‘If the relation between employee and union were that of mandator and mandatory, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to me to be a complete misapprehension of the nature of the juridical relation involved in the collective agreement. The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the terms.’

If we refer to and consider the document signed by the Chief of Police and Irvine to be an ‘agreement’ or contract of employment, the law settles that Irvine, a member of good standing of the Winnipeg Police Association, a party to a valid and subsisting collective bargaining agreement, was not in a position to privately and on her own behalf negotiate and enter in to a separate contract or agreement covering terms and conditions of employment. Aside from offending the provisions of the collective bargaining agreement and creating grounds on which a grievance could be filed by other members of the bargaining unit, it brings into question the capacity of Irvine to enter into such an agreement. If as a result of the existence of a collective bargaining agreement Irvine did not have the capacity to enter into such a private employment agreement, the contract is invalid. On the other hand, does it follow that, although she ought not to have negotiated or signed such a contract, since she did, her action amounts only to a breach of the collective bargaining agreement, creating grounds for the institution of grievance procedures and/or a claim for damages, but does not invalidate the ‘agreement’?

The authorities almost without exception favour the view that such separate agreements are not permitted, and that members of a bargaining unit do not possess capacity to contract on their own. Consequently, if the document is considered to be such an ‘agreement’ or contract of employment it is invalid.”

15. There can be little doubt that this legal conclusion reposes considerable authority in a certified or voluntarily recognized trade union with respect to bargaining unit employees. Indeed, it is the exercise of this authority by the complainants’ trade union in concert with their employer that they wish the Board to review. However, section 14 is not designed to play this role and we share the concern of the respondent’s counsel over the difficulty employers would face if we were to allow the complaint as cast to be pursued. On the other hand, other

provisions of the legislation are specifically designed to deal with allegations of unfairness or inadequate representation although we are not suggesting that the complainants' chances of success were good had they decided to pursue these other avenues before the Board.

16. For all of these reasons, the complaint is dismissed.

0779-80-R Joyce Stinsman, Applicant, v. Canadian Food and Allied Workers Local Union 175, Chartered by The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC, representing the part-time employees of Dunnville Supermarkets Limited, Respondent, v. **Dunnville Supermarket Limited**, Intervener.

Termination – Prior application dismissed on merits – Whether Board barring second application – Employees' right to test union support balanced with maintaining continuity and stability in collective bargaining – *Trinidad Leaseholds* considered – application barred

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members E.J. Brady and M.A. Ross.

APPEARANCES: *Hugh M. Slimon for the applicant; Harold F. Caley and Joe O'Donnell for the respondent; Peter Berti for the intervener.*

DECISION OF THE BOARD; August 27, 1980

1. This is an application under section 49 of the Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is bargaining agent.

2. Counsel for the respondent argues that the instant application, which was filed with the Board on July 11, 1980, follows a similar application orally dismissed by the Board on June 27, 1980 and which dismissal was reduced to writing by Board decision of July 9, 1980, and that the Board should decline to entertain this application following the principle enunciated in *Trinidad Leaseholds (Canada) Ltd.* 52 CLLC ¶17,005 as extended in a number of subsequent Board decisions.

3. On May 30, 1980 an application was filed under section 49 of the Act by Linda Robinson (Board File No. 0486-80-R) in respect to all employees represented by the respondent union. At the hearing on June 27, 1980, it appeared that the respondent represented two separate bargaining units comprised, in one case of full-time employees, and in the other case of part-time employees. The application was amended to request declarations in respect to each such unit. The Board then proceeded to hear evidence respecting the origination and circulation of a counter-petition affecting the part-time unit. The Board concluded that the counter-petition was established as signifying the voluntary wishes of its signatories and that the overlap of signatories between the counter-petition and petition was such as to reduce the employee support of the applicant below forty-five per cent of the employees in the part-time bargaining unit. The Board thereupon orally dismissed the application insofar as it related to the part-time bargaining unit.

4. The respondent made an application for conciliation services on June 30th and a Conciliation Officer was appointed July 7th, and a short meeting held on July 29th.

5. The applicant argues that the previous application which was dismissed on June 27, 1980 was made by Linda Robinson who is not a member of the part-time unit but who was and is a full-time employee, and that therefore it could be concluded that the previous application in respect to the part-time bargaining unit had not been then properly before the Board and consequently, the instant application is the first application affecting the part-time unit. It is not within the authority of this panel of the Board to review a decision of another panel of the Board. We entertain the applicant's argument only to the extent that it seeks to establish that there are here two discrete applications because the applications have been launched by two separate individuals.

6. Section 49(2) of the Act provides:

"Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit, . . ."

The Board, in the past, has gone beyond the designation of the applicant in the style of cause in determining who are the true applicants in a section 49 application. While each case must turn on its own individual facts, the thrust of the Board decisions is that we must look through the form to the substance and conclude that the application is properly brought where the Board is satisfied that it is brought by the employees of the affected bargaining unit. The matter was most recently dealt with by the Board in *St. Michael's Shops of Canada Limited*, [1979] OLRB Rep. Oct. 1023. In that case, application was made under section 49(2) of the Act in respect to two bargaining units covered by a collective agreement. The individuals named in the style of cause were both members of the same bargaining unit and it was argued that because of the absence in the style of cause of a named employee member of the other bargaining unit, that the application should not be entertained in respect to that unit. The Board in rejecting the argument stated:

"9. The Board has taken a far less technical approach, however, in two other cases: *R. Forget and a Group of Employees and Retail Clerks Union, Local 486 and Dominion Stores Limited*, Board File No. 18379-70-R, which is referred to in paragraph 6 of *Dyker v. Retail Clerks, supra*; and *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434. In the former decision (*Forget*), the application's style of cause showed the applicant as 'R. Forget and a Group of Employees'. Forget was an Employee in the Employer's full-time unit and the unit affected by the application was a unit of the employer's part-time employees. The Board took note of that circumstance and stated 'In our opinion, whatever may be said of Forget's status as an applicant, the employees who identify themselves as such on the statement accompanying the formal application are *prima facie* entitled to bring the application. . . .' In *Selinger* the Board was confronted with the situation where the employee named as the applicant in the style of cause of the application advised the Board at the hearing that he was withdrawing the application. The Board proceeded to hear and

determine the application when two employees who were signatories to the document and present at the hearing made it known that they wished the Board to proceed with the application. While the facts in both of these decisions are different from the application at hand, the Board in each case was faced with a problem relating to the identification of the applicant in the style of cause of the application. In each case the Board went beyond the form of the application to examine its substance. In so doing it was not ignoring the statutory provisions governing the making of such applications, but rather was determining on the facts before it who were the true applicants and whether they were the proper ones within the statutory provisions.”

The Board went on to find,

“10. ... Thus the application when taken together with the statement, and having regard to the heading note on the petition, establishes that the employees of both bargaining units defined in the collective agreement... are applying for a declaration that the respondent no longer represents them...”

7. We, therefore, conclude that in the instant case the true applicants are the part-time employees in the bargaining unit represented by the respondent. We also conclude that the true applicants in the application dismissed on June 27, 1980 were likewise the same part-time employees, and that the representation issue is thus being raised by the same parties for the second time by the current application.

8. The Board’s practice in entertaining successive applications raising the issue of representation in respect to the same bargaining unit is dependent on the total circumstances in which the matter is raised. In situations such as exist in the instant case, of there being an existing collective bargaining relationship the Board is faced with the task of balancing the employees’ right to test the respondent union’s support and the equally desirable objective of maintaining continuity and stability in the collective bargaining relationship. The Board’s jurisprudence in this latter situation starting with the *Trinidad Leaseholds* case, *supra*, is well reviewed in the case of *Seven-up (Ontario) Limited*, [1971] OLRB Rep. Dec. 791 and summed up at paragraph 16 by the following statement.

“The *Trinidad Leaseholds* case and subsequent decisions based on its principles stand for the proposition that when a second application for certification or termination is made upon the heels of a prior application involving the same parties, in determining whether it should refuse to entertain the second application, the Board must balance the right to test an incumbent trade union’s strength among the employees it represents at an appropriate time against the maintaining of continuity and stability in an existing collective bargaining relationship. Stated another way, once a representation issue has been dealt with on its merits and in the absence of special circumstances, then an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate, without undue impediment, its ability to bargain with that employer for a collective agreement on behalf of those employees it represents.”

9. In the instant case, there are no special circumstances to be considered by the Board in its weighing of the right of employees to again raise the representation issue against the desirability of securing stability and continuity in collective bargaining. The employees did raise the representation issue in the earlier application and the matter was dismissed on the merits. The respondent union should now be afforded a reasonable opportunity to pursue its collective bargaining objectives.

10. The Board is of the opinion that in the exercise of its discretion under section 92(2)(i) of the Act, it should refuse to entertain the instant application.

11. The application is dismissed.

0856-80-R Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Fibre Therm Corp.**, Respondent, v. Group of Employees, Objectors.

Petition – Employer comments suggesting terminations if union successful – Employer not intending to threaten on coerce – Whether petition voluntary

BEFORE: R.D. Howe, Vice-Chairman, and Board Members T.G. Armstrong and H. Simon.

APPEARANCES: *Susan Stewart, Vincent Knap and Angelo Gabriel for the applicant; G.J. Weir and R. Butler for the respondent; David T. Crone and Dan Owens for the objectors.*

DECISION OF THE BOARD; August 19, 1980

1. This is an application for certification.

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5. There was filed in this matter, in timely fashion, a written statement (hereinafter referred to as the “petition”) expressing opposition to the applicant trade union in the following terms:

“Notice To The Ontario Labour Relations Board of 400 University Ave., Toronto 2.

Take Notice tha the undersigned employees of Fibre Therm Corporation and Fibrmulch of 7 Kenhar Drive, Weston, Ont. and 169 Centre Street East, Richmond Hill, Ont., wish to make known, express and file their opposition to becoming members of any union, and more specifically the Laundry and Linen Drivers and Industrial Workers Union, Local 847 an affiate [sic] of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

It is further understood and agreed by all who have signed this notice that David T. Crone of . . . Thornhill Ont. an employee of the herein mentioned manufacturer is willing and prepared to appear before the Ontario Labour Relations Board of 400 University in the City of Toronto at any time or times to express and convey the opposition of the undersigned to membership in the above mentioned union or membership in any other union at this point in time."

6. In the absence of the petition, which was signed by twenty-one persons, the applicant would be entitled to be certified without a representation vote. However, the overlap between the persons who signed membership cards in the applicant and the persons who signed the petition is sufficient that the Board would exercise its discretion to direct a representation vote if the Board were satisfied of the voluntariness of the petition. Accordingly, the Board conducted its usual enquiry into the origination and circulation of the petition.

7. The petition was prepared and circulated by David Crone who is a "quality control man" employed by the respondent. It is clear from his testimony that Mr. Crone attempted to circulate the petition in such a manner that each employee would feel free to sign or refrain from signing the petition in accordance with his own opinion concerning the merits of unionization. However, circumstances beyond his control foiled Mr. Crone's efforts to maintain an environment in which voluntariness would prevail.

8. Before Mr. Crone held two meetings with employees near the plant during the noon and evening meal breaks, Robert Butler, the President and co-owner of the respondent, discussed the union with two employees with whom he is quite friendly. One of those employees was Scott Allan, who is one of Mr. Butler's longest term employees. Mr. Allan, who was very candid witness, testified that on the morning of July 29, 1980, Mr. Butler asked him in an angry or upset tone: "Why didn't somebody come to me and talk to me about the Union?" Mr. Allan replied that the last time someone tried to bring a union in, he was fired. In response to this, Mr. Butler said: "Scotty, you know me better than that." Mr. Butler also told Mr. Allan that he was afraid that he was "going to lose a lot of good men if the union came in". Although the Board accepts Mr. Butler's explanation that what he intended to express by those words was his concern that some of his good employees would leave because a union might "rub them the wrong way", Mr. Allan thought that Mr. Butler meant that the plant would be closed if a union came in. As a result of that conversation which took place in Mr. Butler's office, Mr. Allan was "hurt and upset". He testified that he "felt pretty bad because Rob (Mr. Butler) was always there to help [him] out when [he] was off work". Mr. Allan stated that he did not at any time feel that he personally was going to lose his job, but he was worried that others might because he had heard that a former employee of the respondent named Cartier had been terminated by Mr. Butler for attempting to unionize the Company. Although there is no evidence before the Board that in any way substantiates that Cartier or anyone else was discharged by the respondent as a result of union activity, the fact that at least some of the employees believed that such an incident had occurred is a relevant factor to be considered in determining whether the petition represents a voluntary statement of desire on the part of the employees who signed it, particularly in view of Mr. Allan's misinterpretation of Mr. Butler's statement concerning potential loss of good employees because of the union.

9. Later that morning, Mr. Crone approached a group of employees who were eating their lunches at a plant doorway adjacent to the plant's spur railway line. He told them that he was going to have a meeting on the railway allowance about the union and that anyone who

wanted to go to the meeting could come with him. One of the employees said: "Wait 'til I eat my lunch, then I'll go out." Mr. Allan then told that employee: "If you had the same talk which I had this morning you'd want to get the hell outside and listen to what Crone has to say." All of the employees in the group then followed Mr. Crone to the railway allowance which is about fifty to seventy-five feet from the plant, where Mr. Allan informed them of his conversation with Mr. Butler and told them that he "thought that Rob (Mr. Butler) would fold up if the union came in". Mr. Crone then told Mr. Allan that he "must not pressure people to sign" and stated that he thought that the decision about unionization should be made only after the employees had heard from the union and from management in order to permit "a reasonable and sound decision on the basis of all sides of the story". He also told employees that if a sufficient number of signatures were obtained on the petition, a vote would be held "on the floor" and that they would "hear both sides of the story" before the vote. The petition was then circulated among the employees. Mr. Crone, who was "very surprised that all of the employees followed him out [to the railway allowance]", was also amazed by the response of the employees to the petition, as indicated by the following testimony: "I had no idea that people would say: 'Here, give it to me. I'll sign it'. I couldn't believe it. This unusual, I thought they'd at least want to take some time to think about it." Prior to that meeting, the petition had been signed only by Mr. Crone. The next eight signatures on the petition were obtained at that meeting. Further signatures were obtained by Mr. Crone in the Company parking lot, the lab and church parking lot.

10. Mr. Crone returned to the plant that evening during the meal break for the night shift at approximately nine o'clock. The night shift foreman was present when Mr. Crone arrived but he went to another part of the plant shortly thereafter without asking Mr. Crone why he was there. Mr. Crone then invited the employees to come with him to the road allowance in front of the plant where he told them "essentially the same things that [he] said at the first meeting". Eight additional signatures were obtained at the second meeting.

11. The vigilance of this Board upon inquiries into the voluntariness of petitions is well-established. As stated in *Valley Bottling of Canada Ltd.*, [1978] OLRB Rep. Aug. 784, at paragraph 17:

"The Board has held in numerous decisions that a natural suspicion attaches to a statement of desire which follows on the heels of a union organizing campaign. The Board must assure itself that employees who have first indicated support for a trade union and then indicate a desire to withdraw that support have undergone this change of mind by their free choice; that is, free of overt or subtle influences issuing from the employer against the union. The Board, in assuring the rights of employees under the Act to select or reject a trade union as bargaining agent, recognizes the opportunity that employees' dependence on the employer for their job security gives the employer to unduly influence their freedom of choice, *intentionally or unintentionally*." [Emphasis added.]

(See also *Morgan Adhesives of Canada Limited*, [1975] OLRB Rep. Nov. 813.)

12. The Board is satisfied that Mr. Butler did not intend, by speaking to Mr. Allan and the other employee to whom he spoke, to in any way threaten, intimidate or coerce Mr. Allan or any other employee. However, in view of the interpretation of Mr. Butler's statement which

Mr. Allan, a long-term employee and personal friend of the President, gave to the other employees, namely that Mr. Butler would close the plant if the union came in, it is probable that at least some of the employees who signed the petition did so because they feared that they would lose their jobs if the union were certified. Thus, a coercive atmosphere was created in which employees would be concerned about their job security.

13. Further doubt is cast upon the voluntariness of the petition by the fact that at least some of the employees perceived Mr. Crone to be a member of management. Before becoming a quality control man, Mr. Crone had been a foreman on the day shift from “the middle of October of 1979 to the end of January or middle of February of 1980”. Two of the persons who signed the petition had worked under Mr. Crone when he was a foreman. As a quality control man, Mr. Crone is responsible for ensuring that the insulation produced by the respondent complies with the requirements of the *Hazardous Products Act*. He spends approximately three-quarters of his time on the floor of the plant checking bag weights and performing various safety tests on the product. If the weight of a bag is not correct, he informs the employee responsible and directs him to remedy the situation. Although he does not in fact have the power to discharge employees, at least some of the employees perceive him as having such power. This perception was no doubt reinforced by the fact that approximately three weeks before the present application was filed, Mr. Crone threatened to discharge an employee unless he “cleaned up his act”.

14. Although Mr. Crone and counsel for the respondent contended that the validity of the petition should be based on Mr. Crone’s actual status, which they submitted is non-managerial, the Board, in determining the voluntariness of a petition, is concerned with what was reasonably perceived by the employees rather than with objective reality (see *Dad’s Cookies Ltd.*, [1976] OLRB Rep. Sept. 545). Whatever may be the actual authority of Mr. Crone, the Board is satisfied that at least some of the employees reasonably perceived him as having the power to discharge employees and as being in greater proximity to managerial authority than other employees.

15. The burden of proving that, on the balance of probabilities, the petition represents a voluntary statement of desire on the part of the employees who signed it lies upon the objectors (see *Leamington Vegetable Growers Co-operative Limited*, [1974] OLRB Rep. June 402). Having regard to all the evidence before it, the Board finds that the objectors have not discharged that burden and that the petition does not cast doubt upon the evidence of membership filed in support of this application.

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17. A certificate will issue to the applicant.

0697-80-R Commercial Workers Union, Local 486 Chartered by the United Food & Commercial Workers International Union, Applicant, v. **General Bearing Service Ltd.**, Respondent, v. Group of Employees, Objectors.

Adjournment – Request for adjournment after hearing commencing – Board policy on adjournments considered

BEFORE: R.D. Howe, Vice-Chairman, and Board Members E.J. Brady and M.A. Ross.

APPEARANCES: *Ian Roland, Cliff Evans and Barry Baily for the applicant; L.M. Joyal, Q.C., and Ernest Bouchard for the respondent; no one appearing for the objectors.*

DECISION OF THE BOARD; August 11, 1980

1. This is an application for certification.
2. The applicant has not previously been found to be a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*. Accordingly, the Board heard evidence and argument on the threshold question of whether the applicant is a trade union within the meaning of the Act. Having regard to all the evidence before it and the submissions of the parties, the Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.
3. Although Mr. Bouchard, the President of the respondent, appeared at the hearing with counsel, the respondent failed to file a reply, a list of employees and specimen signatures. After cross-examining witnesses called by the applicant and making submissions concerning the issue of the trade union status of the applicant, counsel requested that the balance of the case be adjourned and reconvened in Ottawa "at a date to be fixed by the Board and/or convenient to the parties". In support of this request, counsel noted that he had also requested a change of venue for the three section 79 complaints which have been filed against the respondent by the applicant (Board Files Nos. 0698-80-U, 0862-80-U and 0863-80-U) and that he understood from the Registrar that this request had been "favourably received". Counsel also indicated that the basis for the requested adjournment and change of venue was the availability of simultaneous translation services in Ottawa which, counsel suggested, would partially satisfy Mr. Bouchard who, counsel advised the Board, maintains as a matter of principle that the Board's proceedings should be conducted bilingually to permit him to "respond to the application in a manner which would be meaningful to him". Counsel also suggested that the invocation of section 7a by the applicant indicated that the certification application and the section 79 complaints are all "part and parcel of the employer – employee relations picture" and that "they are all issues which for the benefit of the Board and the parties might probably be better heard if not together, at least before the same panel."
4. Counsel for the applicant opposed the motion for an adjournment and change of venue on the basis of the Board's well known and long standing policy of refusing to grant non-consensual adjournments, particularly in certification cases, in the absence of compelling circumstances. He noted that the disposition of the application had already been somewhat delayed by the extension of the terminal date, originally fixed as July 11, 1980, to July 18, 1980 as

a result of the respondent's request that certain documents be provided in French. He contended that there was no merit in the request for simultaneous translation as counsel for the respondent was bilingual and an interpreter supplied by the Board was present at the hearing to translate from French to English and English to French. Counsel also noted that it is not the practice of the Board to hold certification hearings outside of Toronto. With respect to the invocation of section 7a, counsel stated that, as indicated in his letter to the Board dated July 22, 1980 (a copy of which was sent to counsel for the respondent prior to the hearing), the applicant only relies upon section 7a if the Board determines that the applicant is in a vote position. He further advised the Board that he understood from the Labour Relations Officer that it would be unnecessary for the Board to consider the applicability of section 7a because the applicant was in an "automatic certification" position. He contended that the delay which would result from granting the requested adjournment would cause grave prejudice to the applicant. He conceded that another member of his firm had earlier written to counsel for the respondent to request the latter's consent to the certification hearing being adjourned from July 25, 1980 to August 8, 1980, but suggested that this was irrelevant because counsel for the respondent had refused to consent to the requested adjournment, and because that request had been made at a time when only one section 79 complaint had been filed. He stated that the applicant's desire for an adjournment had been extinguished by the two additional section 79 complaints which arose after the request for an adjournment was made by his colleague. He also indicated that the applicant had arranged for three persons to come to Toronto from Ottawa for the purpose of the hearing.

5. The Board has a discretion to adjourn any hearing, if it considers it advisable in the interests of justice, for such time and to such place and upon such terms as it considers fit (see Rule 57(1)) of the Board's Rules of Procedure; see also section 21 of *The Statutory Powers Procedures Act*, 1971, S.O. 1971, c. 47). In exercising this discretion, the Board has adopted a policy which recognizes the great importance of expedition to the efficacious administration of *The Labour Relations Act*. In *Re Avenue Structures*, [1979] OLRB Rep. Nov. 1036, at paragraph 8, the Board stated:

"... The usual practice of the Board is to grant adjournments only on the consent of all of the parties to a proceeding. With respect to situations where one party is not prepared to agree to an adjournment, in the *Baycrest Centre of Geriatric Care* case, [1976] OLRB Rep. 432, the Board stated as page 433:

'5. The Board policy with respect to adjournments has been cap-sulized in the *Nick Masney* case [1968] OLRB Rep. 823 (upheld in the Ontario Court of Appeal, 70 CLLC ¶14,024) wherein the Board stated:

'... the Board's decision to deny the respondent's request for an adjournment was based on the Board's practice to grant adjournments only on consent of the parties or where the request is based on circumstances which are completely out of the control of the party making the request and where to proceed would seriously prejudice such party i.e., where it is proven that a witness essential to the party's case is unable to attend because of serious illness...'"

As noted in *Canada Dry Bottling Company (Kingston) Ltd.*, [1978] OLRB Rep. Nov. 976, at paragraph 8, labour relations policy considerations make adherence to this approach particularly important in certification cases:

“... In certification matters it is particularly important that all parties be prepared to prove their case on the date fixed for the hearing. Delays can often cause serious and irreparable prejudice to the applicant. As Estey, C.J.O. (as he then was) noted in *Journal Publishing Co. of Ottawa Ltd. et al v. Ottawa Newspaper Guild Local 205, OLRB et al* (unreported) March 31, 1977 C.A.) ‘labour relations delayed are labour relations defeated and denied’. (See also *Komo Construction Incorporated v. Quebec Labour Relations Board et al*, 68 CLLC ¶14,108 (SCC)).”

(See also *Melnor Manufacturing Limited*, [1969] OLRB Rep. Mar. 1288, *The Savarin Limited*, [1969] OLRB Rep. Mar. 1297; and *Civil Services Assoc. of Ont. (Inc.)* [1971] OLRB Rep. Aug. 538).

6. The powers of the Board with respect to adjournments were recently confirmed by Divisional Court in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879* (1979), 24 O.R. (2d) 400, at pages 404 and 405:

“Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of a request for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the party seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

This is not to say that there cannot be situations in which a refusal to grant an adjournment might amount to a denial of natural justice. There are circumstances in which that might be so: see, for example, *R. v. Ontario Labour Relations Board, Ex p. Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461, 13 D.L.R. (3d) 289 (C.A.); *Re Gill Lumber Chipman (1973) Ltd. and United Brotherhood of Carpenters & Joiners of America, Local Union 2142* (1973), 42 D.L.R. (3d) 271, 7 N.B.R. (2d) 41. It is necessary to examine the facts of each case to determine if the tribunal acted, as it must, in a fair and reasonable way. It must, of course, comply with the provisions of *The Statutory Powers Procedure Act*, 1971, S.O. 1971, c. 47, and afford the parties the opportunity to be present and be represented, if they wish, by counsel. But a party who has adequate notice of

the hearing does not have a right to an adjournment and is not entitled to insist on one for his convenience or the convenience of his representative. It is for the Board to determine whether to adjourn on the basis of the obvious desirability of speedy and expeditious proceedings in labour relations matters, the background of the particular case, the issues involved, the reason for the request and other like factors.

...

It cannot be suggested that the Board may not in the exercise of its discretion adopt a general policy respecting adjournments of its proceedings: see *The King v. Port of London Authority, Ex p. Kynoch, Ltd.*, [1919] 1 K.B. 176. That policy is obviously necessary to the proper administration of the Board's process..."

7. After considering the submissions of counsel and its policy on adjournments, the Board unanimously ruled that this was not an appropriate case for an adjournment with a continuation of hearing in Ottawa. In making this ruling, the Board noted that, at the request of Mr. Bouchard, the Board has arranged for the Form 5 Notice to Employees of Application for Certification and of Hearing to be translated into French. Moreover, by decision dated July 11, 1980, the Board had directed the Registrar to extend the terminal date from July 11, 1980 to July 18, 1980 to allow time for the revised Form 5 to be posted and considered. Arrangements had also been made by which an interpreter was available at the hearing to translate from French to English and English to French to ensure that all parties could fully and effectively participate in the hearing of this matter. The representation of the respondent by very able bilingual counsel further ensured that Mr. Bouchard would be in a position to effectively respond to the application if he chose to do so. While an adjournment and resumption of hearing in Ottawa might have been appropriate if it had been necessary for evidence and argument to be presented in relation to an application for certification of the applicant under section 7a, the applicant's membership position in the present case (as set forth later in this decision) entitled it to certification without a vote irrespective of the applicability of section 7a. Counsel for the respondent did not suggest that anything improper or irregular had occurred with respect to the membership evidence such that it might be necessary for the Board to receive *viva voce* evidence concerning it or any other matter relevant to this application. Thus, at the time the request for an adjournment was made, only a few moments of additional time were required for disposition of the application. In view of the foregoing, the Board hereby confirms the ruling by which it denied the request for an adjournment and resumption of hearing in Ottawa.

8. Upon being informed of the Board's ruling at the hearing, counsel for the respondent and Mr. Bouchard withdrew and the hearing proceeded in their absence.

9. The Board further finds that all employees of the respondent in Ottawa, Ontario, save and except Manager, and persons above the rank of Manager, constitute a unit of employees appropriate for collective bargaining.

10. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 18, 1980, the terminal date fixed for this

application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.
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1473-78-R International Union of Operating Engineers, Local 793, Applicant, v. H. Kerr Construction Limited, Respondent.

Certification – Construction Industry – Reconsideration – Board issuing certificate under construction industry sections – Employees not raising objection prior to certification – Employer seeking reconsideration after Act amended extending bargaining rights – Whether grounds for reconsideration established

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and M. J. Fenwick.

DECISION OF THE BOARD; August 22, 1980

1. The Board, in a decision issued December 8, 1978, certified the applicant as bargaining agent for the following unit of employees of the respondent:

All employees of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope) engaged in the operating of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.

This decision, on consent of the parties, was made by the Board without a hearing being held pursuant to section 91(13) of *The Labour Relations Act* which gives the Board the discretion to determine the merits of an application for certification in the construction industry without the need to hold a hearing.

2. The respondent, by letter from its counsel dated July 8, 1980, is requesting that "... the Board reconsider its decision herein and revoke or amend the Certificate issued to the applicant."
3. The reason for this request is stated in the following terms in the letter:

"The request is made on the basis that the work performed by the employees of the respondent at the time the application was made was not work in the construction industry. The Application for Certification therefore was not properly within the meaning of Section 108 of *The Labour Relations Act*. The work done by the five employees set out on

Schedule "A" to the Application was that of stripping a gravel pit and is not work which falls within the meaning of 'construction industry' in Section 1(1)(f) of the Act."

The respondent gives the following reasons for not raising at the time the application was made, an objection that the work being performed was not work coming within the construction industry:

"The reason no objection was raised at the time the Application was filed was because it made no substantial difference to the employer *at the time* whether he was bound to negotiate pursuant to a construction industry certificate or an industrial certificate. In fact, it was very common practice for employers who were engaged primarily in the construction industry to make no objection to Applications for Certification made pursuant to the construction industry sections of the Act even though the work being performed was outside the construction industry. There were a number of reasons for this practice:

1. As stated earlier, it made no difference to the employer whether he was bound to negotiate pursuant to a construction Certificate or an industrial Certificate since often construction rates and conditions applied to the work being performed even though that work was not in the construction industry.
2. If a Union had the required representation from among the employees, it would be certified one way or the other in any event.
3. The process of certification pursuant to the construction industry sections of the Act did not require a hearing before the Board and was therefore in many cases more expedient and less expensive."

4. The Board's authority to reconsider its decisions comes from section 95(1) of the Act, the same section gives the Board the authority to determine all questions of fact or law which arise in matters before it and which reads:

"The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling."

The Board would be acting pursuant to its discretion therein were it to grant the request that it reconsider the decision which it issued December 8, 1978 or to grant the respondent's request of a hearing in order for it "...to lead evidence and make representations regarding this request".

5. Since the Board's decision was issued without a hearing pursuant to section 91(13) of the Act, the Board finds it useful to set out that section hereunder together with sections 1(1)(f), 1(1)(n) and, from the Construction Industry provisions of the Act, sections 106(b), (c) and (f) which are relevant to this matter:

"92(13) The Board may, subject to the approval of the Lieutenant Governor in Council, make rules to expedite proceedings before the Board to which sections 106 to 124 apply, and such rules may provide that, for the purposes of determining the merits of an application for certification to which sections 106 to 108 apply, the Board shall make or cause to be made such examination of records and such other inquiries as it considers necessary, but the Board need not hold a hearing on such an application.

1(1) (f) 'construction industry' means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof;

(n) 'trade union' means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

106. In this section and in sections 107 to 124,

(b) 'employee' includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees;

(c) 'employer' means a person who operates a business in the construction industry, and for purposes of an application for accreditation means an employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;

(f) 'trade union' means a trade union that according to established trade union practice pertains to the construction industry."

6. The Board's Rules of Procedure contain in sections 66 through 75 provisions pertaining to applications for certifications in the construction industry and the Rules also provide special forms to be used for these applications so as to provide the information which enables the Board to dispose of applications without the need to hold a hearing particularly when, as was the case herein, the parties consent to such disposition.

7. The application and reply filed in the instant case were on the forms prescribed by the Regulations for the construction industry and contained information which allowed the

Board to make findings of fact and law essential to disposing of the application without a hearing, namely the following. It is a matter of Board record that the applicant is a trade union within the meanings of sections 1(1)(n) and 106(f) of the Act. The application and reply establish that:

- (a) the respondent operates a business in the construction industry as a road builder,
- (b) the employees affected by the application were operating heavy construction equipment which is in the nature of the work performed by persons in the construction industry customarily represented by the applicant and is consistent with the work described in the bargaining unit usually granted by the Board to the applicant; and
- (c) the work in which the employees who were operating the heavy construction equipment were engaged was the stripping of a gravel pit on the 3rd Concession Road, north of Goodwood in Uxbridge, Township, County of Durham.

This information enabled the Board to make the finding that the application was an application for certification within the meaning of section 108 of the Act and, as required by that section, "... determine the unit of employees that is appropriate for collective bargaining by reference to a geographic area..." and not confine the unit to a particular project. The result is evident in the unit which the Board found to be appropriate for collective bargaining. Furthermore, that unit is described without reference to any of the sectors of the construction industry as set forth in section 106(e) of the Act, of which the industrial, commercial and institutional sector is one. As a result, the applicant was certified as the exclusive collective bargaining agent for the employees of the respondent in that unit; within the geographic area described and for all sectors of the construction industry. By describing the unit that way, the Board was proceeding according to its customary and consistent practice. (See *Lyle West Electric Limited*, [1978] OLRB Rep. Nov. 999.)

8. At that same time, pursuant to the province-wide bargaining provisions of the Act which apply only to the industrial, commercial and institutional sector, the applicant's bargaining rights in respect of "...conducting bargaining and, ..., concluding a provincial agreement." (section 130) were vested in an employee bargaining agency designated by the Minister (section 127(1)). In a similar manner and for the same collective bargaining purposes, the respondent's bargaining rights were vested (section 131(a)) in the employer bargaining agency designated by the Minister (section 127(1)). Pursuant to sections 132(4) and 134(2) as they existed prior to their amendment on May 1, 1980, the applicant and respondent became bound by the relevant provincial agreement, if any, in effect at the time of certification or subsequently between the designated employee bargaining agency and the designated employer bargaining agency, *but only to the extent of the bargaining rights established by the Board's certificate*. The bargaining rights in respect of all sectors other than the industrial, commercial and institutional sector created by the Board's certificate remained vested in the applicant and entitled the applicant to bargain for a collective agreement relating to the other sectors, or any of them. The Board has no evidence before it as to whether any agreement was concluded between the parties.

9. Effective May 1, 1980, section 125(2) of the Act, a new section, came into force. The effect of this change on the respondent was to deem that it now recognized all of the other affiliated bargaining agents (in their respective geographic jurisdictions) of the designated bargaining agency which represents the applicant and in respect of the industrial, commercial and institutional sector. Effective also May 1, 1980, section 134(2) was amended so that the respondent is bound in respect of all affiliated bargaining agents for their respective geographic jurisdictions to the provincial agreement, if any, in effect on that date and subsequently between the employee bargaining agency and the employer bargaining agency. It is these changes in the Act which have prompted the respondent to make its request at this time.

10. The Board has been very cautious, as a general approach, in exercising its discretion under section 95(1) to reconsider its decisions. The Board's decision in *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. Sept. 609 refers to that discretion as a "unique jurisdiction" and in paragraph 3 of that decision at page 609 the Board succinctly states its reasons for caution:

"However, this jurisdiction is very carefully and cautiously exercised by the Board in that free recourse to the Board after the initial disposition of a matter would substantially undermine those values of speed and economy associated with the administrative practice of the Board. In other words, except for exceptional circumstances, litigation between the parties ought not to be prolonged."

The general grounds on which the Board will reconsider a decision are set forth in the following terms in the Board's decision in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

"Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously. (*International Nickel Co. of Canada Ltd.*, [1963] OLRB Rep. 234, 64 CLLC ¶15,493 (Ont. H.C.); *Detroit River Construction* case (1962), 62 CLLC ¶16,260). Both legs of this principle depend upon the applicant having been diligent and therefore having had no opportunity to draw the Board's attention to the object of its concern." [emphasis added]

In respect of the second leg of the principle, the Board, in *Imperial Tobacco*, *supra*, commented as follows in treating with the request of a respondent for the opportunity to make additional legal argument:

"... one of the respondents wishes to make additional legal argument although it had every opportunity to make submissions to the Board at the original hearing. For this reason alone the Board should be exceptionally cautious in even beginning to entertain reargument. But having said this, it should not be said that the Board will never listen to addition-

al legal argument particularly when its original decision is clearly wrong in law or inadvertently contrary to earlier Board practice.”.

11. While both of these decisions were dealing with circumstances in which the Board had held a hearing, they are indistinguishable from the instant case because the Board’s procedures afforded the respondent full opportunity to make written submissions to the Board or request a hearing. Paragraph 14 of Form 55, “Reply to Application for Certification, Construction Industry” provided the respondent with the following choices:

14. (1) The respondent consents to the application being disposed of by the Board without a hearing by the Board:

OR

- (2) The respondent consents to the application being disposed of by the Board without a hearing by the Board and makes the following representations thereon (use additional pages if necessary):

OR

- (3) The respondent requests a hearing of the application by the Board and undertakes to attend a hearing of the Board for this purpose. The respondent states in support of this request as follows (use additional pages if necessary):

As stated earlier in the decision, the respondent consented to the Board disposing of the application without a hearing. It did this by striking out 14(2) and 14(3). Had the respondent requested a hearing, section 73 of the Rules of Procedure require that it be supported by “. . ., a concise statement of,

- (a) the material facts upon which he proposes to rely at the hearing;
- (b) the relief to which he claims to be entitled by reason of such facts; and
- (c) the submissions he proposes to make in support of his claim for relief.”.

Thus the respondent rejected both alternatives available by which, in the words of the *Canadian Union* decision, *supra*, it could “. . . draw the Board’s attention to the object of its concern.” From the very reasons to which counsel attributes the alleged practice of construction employers not objecting to applications for certification being processed in accordance with the rules for the construction industry when the work involved is alleged not be work in the construction industry, it may be inferred quite readily that there was nothing of concern that the respondent wanted to put before the Board. Now that the Act has been amended by the addition of section 125(2) the respondent has found an object of concern, that being the statutory extension of bargaining rights beyond the applicant to all affiliated bargaining agents of the employee bargaining agency within their respective jurisdictions.

12. The respondent is not seeking to bring before the Board new evidence or to make representations or objections in keeping with the principles set out in *Canadian Union, supra*, rather it is seeking an opportunity to put before the Board evidence which it could have presented at the time of the application and chose not to do so. Now it has come in July 1980, as a result of legislation which passed December 19, 1979 to have effect from May 1, 1980 (*The Labour Relations Amendment Act, 1979 (No. 2)*, S.O. 1979, c. 113) and would have the Board reconsider a decision which granted bargaining rights to the applicant December 8, 1978 and risk disturbing the collective bargaining relationships flowing from that grant of rights. While the Board made the decision without a hearing, it was made pursuant to section 91(13), the Board was able to make the necessary findings of fact for the decision from the information contained in the application and reply thereto and the resulting decision is not "... clearly wrong in law or inadvertently contrary to earlier Board practice."

13. For all of those reasons and having regard for the need for certainty and finality in the Board's decisions, the Board will not schedule the hearing requested by the respondent and does not deem it advisable to reconsider, amend, vary or revoke its decision which issued December 1978.

0164-80-U Hotel and Club Employees' Union, Local 299, Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L. – C.I.O. – C.L.C.), Complainant, v. **Hotel Canadiana**, Respondent.

Change in Working Conditions – Discharge for Union Activity – Employer establishing breach of company policy causing discharge – Change in policy occurring during statutory freeze – Whether discharge contrary to section 70

BEFORE: E. Morris Davis, Vice-Chairman, and Board Members M. J. Fenwick and F. W. Murray.

APPEARANCES: *Patricia M. Conway for the complainant; J. A. Roffey and J. P. Charron for the respondent.*

DECISION OF THE BOARD; August 27, 1980

1. This is a section 79 complaint alleging that the respondent has contravened section 58 of the Act in its dealings with George Colbourne and Dudley Brown, and it is also alleged there has been contraventions of section 70 of the Act. The same facts are, in the main, relied on to establish contraventions in both instances.

2. The respondent Hotel has, since July, 1979, been undergoing changes in management as well as renovations and revisions of the physical facilities. In the fiscal year ending July 31, 1979 the respondent suffered a loss in excess of \$300,000 and in September, 1979 management commenced to make physical changes. This has been and is a continuing

program; and at the time of the hearing, it was testified that the respondent was currently continuing to renovate single rooms, adding carpeting, renovating the pool area and landscaping. The first move in this program was to bring cable TV into all private and public rooms.

3. The complainant union was certified on February 6, 1980, and served notice to bargain on February 25, 1980. The first negotiating meeting was held on March 26, 1980 and a second meeting on April 10th. Mr. Colbourne, who was the key organizer in the initial organization, is a member of the Bargaining Committee (and also a steward).

4. The evidence is that J. P. Charron, General Manager of the respondent since July, 1979, met with Colbourne in mid-September or October along with the two principal owners and discussed the general need for changes to the Hotel, in an effort to gain maximum employee input. At that time ideas were examined, including the possibility of moving the lounge itself into the Dining Room area. There was no specific discussion about bar stools.

5. Insofar as the lounge is concerned (where Colbourne works as a bartender) a grand piano was brought in and the facility renamed the "Piano Lounge"; draperies were changed, furniture reupholstered, additional furniture added and the refrigeration system expanded. According to Colbourne, the ten stools were removed on April 15, 1980 and he was made aware by the respondent's general manager in advance, "a couple days before, about March 31st". As a result of management's survey of other lounges, it appeared that stand-up bars were something of a fad, and a decision was made to remove the bar stools at the bar tended by Colbourne. Initially three of the ten stools were removed and about a week later the remaining seven stools, which latter were restored to the bar some three weeks later. The decision to remove three stools at the short end of the bar was further influenced by the fact that a telephone was available at that end and there was a tendency for congestion to develop. Mr. Charron testified that the return of the seven stools was in response to customer requests, as was the non-return of the three stools. Sometime during this renovation program, the decision was also made to close the Dining Room which had a separate bar facility and to rely on the Piano Lounge bar to serve the restaurant. Mr. Colbourne complains that the removal of the bar stools affected his income from gratuities and constituted a change such as is prohibited by section 70 of the Act during the period of bargaining; and further complains that such action was an employer response to Colbourne's union activities and, therefore, a contravention of section 58 of the Act.

6. On April 10, 1980 Colbourne who has been the day-shift bartender for sixteen years arranged to switch shifts with the night bartender in order that Colbourne could attend a negotiating meeting. Mr. Colbourne testified that up till recently, it was his practice to gain acquiescence of the other bartender to a shift switch and then "I would approach management and have them approve the change", and such approval was never withheld. In respect to the shift change of April 10, 1980, Colbourne neglected to advise his superior, Mr. Yee, Restaurant Manager. Later that day when Colbourne was at work, Charron mentioned to Colbourne that he shouldn't have changed without informing Yee and that Charron would speak to Colbourne the next morning. Mr. Colbourne states this was in the presence of customers and waitresses. The following day Colbourne, accompanied by his assistant steward, met with Charron and another member of management. It was a very short meeting. Mr. Colbourne states that Charron told him "Not to do it again, or be punished". Mr. Colbourne accepted the reprimand and returned to work.

7. For some eight to ten years, there has existed a staff lunchroom for employees. Mr. Colbourne states that he usually eats at home except for one night a week when he has a long shift. On these occasions Colbourne generally uses the staff lunchroom but occasionally eats in the Coffee Shop. The purpose of eating in the Coffee Shop he states is that when he has inexperienced waitresses, it makes him readily available to them if required to mix a drink. In direct examination the question was put to Colbourne, "Has management been aware of you eating in the Coffee Shop?" to which he replied, "Before the staff lunchroom. But since then, I don't eat in the Coffee Shop." On March 31, 1980, about 7:30 p.m., Colbourne went to eat and he states he had an inexperienced waitress with him so he told her he would be in the Coffee Shop at the staff table, and if the waitress needed anything, she was to come and get him. Mr. Colbourne admits that the table he sat at bore a sign "Restaurant Staff Only" and that he was not part of such staff. Mr. Colbourne states he has previously had lunch in the Coffee Shop with the sales manager on two or three occasions and they sat at the same table. He also states that there was then no sign on the table. While Colbourne was in the Coffee Shop, Charron came in and observed him but said nothing to him. Mr. Charron did remind the hostess on duty that this was against the rules, and later that evening interviewed Colbourne in his office in the presence of Colbourne's superior. According to Charron, he simply reminded Colbourne he was not one of the employees allowed to eat in the Coffee Shop. Mr. Charron states he did not discipline or threaten to discipline Colbourne. Mr. Colbourne, in direct examination, stated "I was reprimanded for using the restaurant facilities and was told I had no business being there" and states that he made no comment. In cross-examination, when asked what Charron had said, Colbourne stated, "Charron said I had no right to be in the restaurant. He said he would punish me and take the bar stools away - I'm not sure he said that. He was very upset with me and my conduct in union activities and the bar stools were going out, to the best of my knowledge." On balance, the Board prefers the evidence of Charron as to the particular meeting.

8. On March 31, 1980 Dudley Brown, a front desk clerk for some eight months, was discharged. The events leading up to the discharge were that Brown wished to purchase U.S. funds which had been received from customers (approximately \$200) and not having the available Canadian funds to do so, he telephoned a friend, Carlton Campbell, who agreed to bring over what money he had (\$145) as a loan to Brown. When Campbell arrived, about 7.30 p.m., he came to the desk, Brown counted the Canadian money and put it on top of the cash register and counted out the U.S. money to Campbell. As this juncture, Charron who had observed the actions from his office, across from the front desk, came over and asked what it was "all about". Mr. Brown's reply was "its for U.S. currency". Mr. Charron asked if the full exchange being paid and Brown replied "I didn't understand what exchange is all about. I'm taking it for myself at ten per cent. I asked my friend to lend the money for me." Mr. Charron then walked away and returned immediately telling Brown he had better give back the money, which Brown did.

9. Later that evening Brown was called to Charron's office where Charron and Peter U, Brown's supervisor, were present. Mr. Charron told Brown he was finished and when Brown asked if he was fired, Charron stated, "You no longer work here. This is hotel property and I look on it as theft. You've got a choice, either walk out of here and resign or I call the cops." Mr. Brown got up to walk out and Charron noted that Brown had said nothing and enquired what was his decision, and again offered the alternative of "walking out" or having "the cops called". Mr. Brown stated he had "too much class and integrity" to make Charron call the police and that he had no choice but to quit.

10. Mr. Brown justifies the transaction with Campbell on the basis that it was an established practice for employees by buy U.S. funds at the hotel, at the hotel's rate of exchange. Mr. Campbell, who testified, states he had previously purchased U.S. funds from Mr. Brown at the hotel and also from Brown's supervisor, Peter U. In respect to the purchase from Peter U, Brown had phoned Campbell to tell him he was leaving work, and that there was some U.S. money at the hotel which Brown had left with Mr. U. Mr. Campbell went to the hotel, saw Mr. U, and exchanged \$110 Canadian for \$100 U.S. Mr. Campbell states on one occasion he purchased U.S. money for his own use from Brown.

11. Later on the night of March 31st, Brown met Mr. U off the hotel premises and during the course of that discussion Mr. U stated, "I did it last year when going to New York".

12. Mr. Brown states he has seen telephone operators and others around the office buying U.S. currency. Mr. Brown also states that shortly after he started to work at the respondent's hotel, he spoke with Peter U, front office manager, and referring to fact he occasionally went to Buffalo, asked if it was permissible to take U.S. funds from the hotel. Mr. U affirmed that it was "so long as you pay the ten per cent".

13. Mr. Colbourne also testified that he has purchased U.S. funds at the hotel and that that has been a practice for years. He also states that previous management has sold U.S. funds to customers and he, himself, has done the same. He did not know if present management was aware of either practice.

14. Mr. Charron testified there was no written policy relating to the handling of U.S. funds and that such belong to the Company in the same way as coffee and chairs do. He states he never discussed the matter of U.S. funds with Brown or any other employee prior to March 31st, and that if he had known about employees' purchases, he would have stopped it. When the question was put as to whether an employee was entitled to rely on the statement of a supervisor as to what was hotel policy, Charron answered affirmatively with the qualification that "Supervisors cannot direct employees to steal Company funds. He would be beyond his authority."

15. Mr. Charron states that he never discussed any union business with Brown and that he had no way of knowing if Brown was involved in preparing for negotiations. Mr. Brown corroborates that he never discussed union business with Charron or with Peter U nor had he been active in union affairs.

16. We direct our attention first to the question as to whether the disciplinary reprimands of Colbourne and the discharge of Brown were violative of section 58 of the Act. The Board's approach to the burden of proof in cases such as this is set out in *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665 at p. 673 as follows:

"18. Having regard to section 79(4a) a respondent employer must satisfy the Board that in taking the actions it took it was in no way motivated by a grievor's union activity. Thus the Board need not find that an employer's sole reason for acting stems from the union activity of his employees to find a violation of the legislation but rather an employer must satisfy the Board that union activity played neither a major nor minor role in regard to its impugned actions."

17. In respect to the discharge of Brown on March 31, 1980, the employer explains that he considered the unauthorized buying and selling of U.S. funds to be akin to "theft" of hotel property and, therefore, warranting discharge. Mr. Brown, on the other hand, states that he had received earlier the assurance of his supervisor that such transactions were permissible and that, on at least one prior occasion, his supervisor, Peter U, had been involved in completing such a transaction on his behalf. Mr. Brown further states that other employees have been involved in similar transactions; and Colbourne corroborated this testimony. Mr. Brown's testimony is uncontradicted and we consider it significant that this supervisor was not called to give evidence.

18. It is not the Board's duty to determine whether the discharge was for cause but rather whether it was motivated to any extent by an anti-union animus. As was said by the Board in *TCE Canada, a Division of Tandy Electronics Limited*, [1979] OLRB Rep. Mar. 259, at p. 262, "... an employer's actions may be so unreasonable as to suggest that there may be an anti-union motive underlying the discharge". We do not find the employer's conduct in the instant case to be totally unreasonable.

19. There was no evidence led of any general pattern of anti-union conduct other than what is alleged to flow from the incidents before us. Mr. Brown's evidence is that he was not active in union activities and Charron states he never discussed union activities with Brown nor was he aware of what part, if any, Brown played. Mr. Charron, at the time of the incident, had been employed for nine months as part of achieving the overall objective of making the operation profitable. We find it credible under those circumstances that he would not have been aware of any employee practice of buying U.S. funds and accept his statement that had it come to his attention earlier, he would have put a stop to it.

20. The complainant suggests that the fact that Brown's discharge occurred on the same day as one of the disciplinary actions involving Colbourne should cause the Board to draw an inference of anti-union animus. In the face of the fact that the employer had no control over the timing of the incidents to which he reacted, we do not think the coincidence of date in itself can justify such an inference.

21. We therefore find that the employer did not violate section 58 in its discharge of Dudley Brown, and the complaint insofar as it relates to that discharge must be dismissed.

22. We turn to the shift and Coffee Shop incidents involving Colbourne. It is clear to us, in Colbourne's own evidence, that in the past he always secured final approval of a shift change from his supervisor. On April 10, 1980 he did not follow this practice and as a consequence Charron reprimanded him. A rule that shift changes must be approved by the supervisor seems perfectly reasonable to us, and particularly so when it has been in effect for some years. Despite that, we must determine whether the reprimand was, in any way motivated by an anti-union animus. As we have noted in our discussion above, there was no evidence led of any general pattern of anti-union conduct, and save for Colbourne's account of his meeting with Charron on March 31st, which on balance we do not accept, no evidence that Colbourne's own union activities had been the subject of comment for action. We can only conclude that the reprimand of April 10th was not violative of section 58 and the complaint insofar as it relates to this incident is dismissed.

23. As to the Coffee Shop incident, Colbourne's evidence as to his past usage of those

facilities under circumstances similar to those of March 31st goes no further than that he used the facilities prior to the establishment of the staff lunchroom (some eight or ten years ago), and has on two or three occasions had lunch there with a member of management which occasions were prior to the placing of the sign, "Restaurant Staff Only", and Charron testified that such sign had been present at least since August 1979. As we have noted above, there is no credible evidence of an anti-union animus being any part of the motivation for Colbourne's reprimand of March 31st, and we must, therefore, find it to be not violative of section 58 and the complaint insofar as it relates to this incident is dismissed.

24. We now direct our attention to whether the removal of the bar stools and the alleged change in Company policy relating to employee purchase of U.S. funds constitutes conduct prohibited by section 70(1) which reads as follows:

"Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,..."

25. The case of *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859 contains a review of the Board's developing jurisprudence in applying this section. The Board defined the impact of section 70 as,

"18. ... What the statutory freeze does is to simply maintain the totality of the employment relationship in the pattern existing at the time that the freeze becomes effective, whether it be a pattern established by prior dealings on an individual basis or prior dealings on a collective basis, making it the starting point for negotiations."

and further,

"19. It should be emphasized that the 'business as before' approach dictates that the totality of the employment relationship be the subject of the freeze. In interpreting section 70, the Board does not place undue influence upon the term 'rates of wages' but recognizes that this term must be read in the context of the other words in that section. The words 'any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees' must also be given meaning and, in the Board's view, section 70 read as a whole manifests a legislative intent to maintain the prior pattern of the employment relationship in its entirety."

26. The complainant argues that the presence of ten bar stools at the bar is a working condition within the meaning of section 70. The respondent argues that the shifting of stools was only a part of a general program of revisions to the lounge which has been under way since

last fall, and that Colbourne had been aware of the general program but not of the specific treatment of bar stools.

27. We think it questionable that the number and placement of bar stools can be properly characterized as a "working condition". It, no doubt, can be said that the presence or absence of the stools will have an impact on the volume of gratuities received by the bartender. That impact may be either to increase or decrease gratuities, and is incidental to the general right of the employer, at the onset of the freeze period, to rearrange his facilities so as to maximize the attraction of customers. The presence or absence of bar stools is done primarily as an arrangement of physical conditions which will best serve the interests of customers and its impact on working conditions is both tangential and incidental. The term or condition of employment or working condition of the employee is to receive gratuities when given, and it cannot be said that part of his employment relationship involves any assurance of the level of gratuities remaining constant.

28. At the onset of the freeze period, the respondent was mid-stream in a program of renovation and revision. The respondent's continuation of such a program during the freeze period is a carrying on of the "business as usual" approach which is envisaged by the legislation.

29. We, therefore, find that the temporary removal of all bar stools and the restoration of a majority of those stools does not constitute a violation of section 70 of the Act and the complaint in that regard is dismissed.

30. The remaining issue before us is whether section 70 has been breached by the dismissal of Brown. The evidence establishes that there has existed a practice or policy which permits employees to purchase U.S. funds for their personal use during visits to the United States, at the same exchange rate as that paid by the hotel in acquiring such funds. That there is nothing in writing to that effect, or that Charron, the present General Manager, was unaware of the practice and was in disagreement with the practice is of no consequence. The practice appears to have grown up under previous management and was confirmed to Brown by his supervisor, the same supervisor who according to the uncontradicted evidence of both Brown and Campbell, also participated in completing such a transaction on behalf of Brown. We see nothing sinister in the practice which is very much akin to employee discounts accorded by employers in many types of businesses. It is a privilege which is accorded to employees and, as such, cannot be unilaterally abrogated during the freeze period.

31. In the instant case, Charron interfered with Brown's exercise of the privilege. Clearly this is violation of section 70.

32. The Board therefore orders:

- (i) that Dudley Brown be reinstated by the respondent forthwith;
- (ii) the Dudley Brown be fully compensated by the respondent for all lost wages and benefits sustained through the respondent's violation of the Act;
- (iii) that the respondent pay interest on the compensation for lost wages

ordered by the Board, such interest to be calculated in the manner described in *Hallowell House*, [1980] OLRB Rep. Jan. 35;

- (iv) that the respondent cease and desist from all acts of interference with employees seeking to exercise their privilege of purchasing U.S. funds for their own personal use while travelling in the United States from the respondent at the current rate of exchange paid by the respondent when acquiring such funds from its customers;
- (v) that the respondent post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this posting requirement is being complied with.

0080-80-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicant, v. **National Dry Company Ltd.**, Respondent, v. Group of Employees, Objectors.

Certification – Membership Evidence – Petition – Foreman soliciting membership evidence – Petitioner threatening job security – Effect on union support considered

BEFORE: M.G. Picher, Vice-Chairman, and Board Members B. Armstrong and J.A. Ronson.

APPEARANCES: *E.G. Posen and Bob Hill for the applicant; Bruce Pollock, Andra Pollock and Elio Madonia for the respondent; Frank Kokkoros for the group of employees.*

DECISION OF M.G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER J.A. RONSON; August 7, 1980

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The respondent is involved in the manufacture and distribution of soft drinks. The application is for the bargaining rights of all employees of the respondent working in its plant at Metropolitan Toronto. Initially the application included truck drivers allegedly employed by the respondent and working out of its plant. The respondent took the position that the

drivers were not its employees and that aspect of the application, made in the form of an application under section 1(4) of the Act, was withdrawn during the course of the proceedings.

4. There are two main issues in this application. The respondent alleges that the application is tainted by the participation of a foreman in the union's membership campaign. The employer submits that the application should be dismissed because of the role of the foreman or, alternatively, that his participation in the union's campaign should cause the Board to hold a representation vote among the employees. The second issue is the voluntariness of a petition circulated in opposition to the application. The petition, filed in a timely fashion, was sponsored by a person whom the union alleges was managerial within the meaning of section 1(3)(b) of *The Labour Relations Act*. On that basis, and on the basis of the circumstances of the document's origination and circulation, the union submits that the petition should be given no weight. It submits that it should therefore be certified outright as the bargaining agent of the employees. An issue collateral to the petition is the employment status of Mr. Frank Kokkoros, a salesman in the respondent's company who was the sponsor of the petition.

5. The Board first heard evidence in respect of the allegation that the application is tainted by the participation of a foreman in the union's campaign. The union took the position that the alleged foreman, Mr. Giacomo Rondana, is a lead hand and not a foreman. The Board therefore conducted an examination of Mr. Rondana with respect to his duties and responsibilities. It also heard evidence of the company's management structures from two members of management called by the company to testify. The parties also agreed that the Board's determination of Mr. Rondana's status would apply to J. Figueroa, a person who performs the same duties as Mr. Rondana on a separate shift.

6. The evidence establishes that Mr. Rondana is responsible for a five-man crew in the respondent's shipping department. A substantial part of his time is spent working manually loading and unloading trucks, repairing skids and driving a forklift. He is also responsible for paper work, common to a shipper. Part of his responsibility is to direct the employees in the filling of orders which he subsequently checks.

7. The evidence establishes that it is within the discretion of Mr. Rondana whether the crew will work overtime, albeit his decision is generally dictated by the volume of work.

8. When working the night shift Mr. Rondana is the person to whom employees report if they need time off or are required to leave early. They likewise come to him to arrange for a day off in advance, although that decision is ultimately taken by the Traffic Manager, Mr. Emilio Calvitto. The evidence also establishes that Mr. Rondana has exercised the authority to correct and initial employees' time cards.

9. When Mr. Rondana's group works evenings, as it does every second week, his crew are the only employees on the plant premises. As part of his responsibilities, therefore, he is required to close the plant. He therefore carries the keys to the plant for that purpose as well as to open the plant in the morning when he works on the day shift.

10. The evidence establishes that Mr. Rondana exercises an effective power of recommendation in respect of the disciplinary discharge or transfer of the employees who work with him. On one occasion he suspected an employee of having pocketed money from a retail sale operation that the shipping department conducted at the time. On the strength of his recom-

mendation management transferred the employee concerned to another department. On a second occasion he informed the Traffic Manager that an employee in the crew was not working to a sufficient standard and recommended that the man be discharged. His recommendation was immediately implemented.

11. A fundamental purpose of the section 1(3)(b) exclusion from collective bargaining of persons employed in a managerial capacity is to avoid the conflict of interest that would be inherent if persons whose first loyalty must be to the company are also required to be represented and participate in the furtherance of a union's interest. While in this case Mr. Rondana is clearly close to the line between a foreman and a lead hand, particularly having regard to the extent of the physical labour he performs, the Board is satisfied that when his duties and responsibilities are viewed as a whole, having particular regard to the power of effective recommendation that he has in respect of discipline, the Board finds that he does exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*. He is, as the company submits, a foreman.

12. That, however, does not dispose of the section 12 issue. Section 12 of the Act provides as follows:

“The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.”

That provision is intended to prevent the certification of unions which are in less than an arm's length relationship with the employer. In other words, it is aimed at preventing the establishment of “sweetheart unions”. It is not uncommon for persons in the gray area at the fringes of management, like Mr. Rondana, whose precise employment status is not clear until a determination is made by this Board, to get involved, sometimes deeply, in a union. (See *Toronto Children's Aid* [1976] OLRB Rep. Nov. 651; *Kelly Funeral Homes Limited*, [1973] OLRB Rep. Feb. 87; *S. D. Adams Welded Product Ltd.*, [1978] OLRB Rep. April 353). Less often, but occasionally, persons of clearly managerial rank lend their support to a union's campaign to organize their employees. (See *Casimir, Jennings and Appleby*, [1978] OLRB Rep. June 507 affirmed in an unreported decision of the Supreme Court of Ontario (Divisional Court) dated July 11, 1978). That, of itself, does not raise a section 12 bar to certification, nor does it necessarily cast any doubt upon the validity of membership evidence. Where the evidence establishes that the foreman or manager was clearly acting contrary to the employer's interests and would have been seen to be so motivated by any reasonable employee, the fundamental concern about a “sweetheart union” underlying section 12 of the Act does not arise. When that is the case the section 12 bar to certification does not arise and there is no reason to presume, absent substantial evidence to the contrary, that the employees were subjected to undue influence in their decision to join a union.

13. The evidence in the instant case establishes that Mr. Rondana was a vociferous supporter of the union. He collected 12 of the 40 membership cards filed on behalf of the applicant. The evidence is also clear that during the course of his activities Mr. Rondana openly acted contrary to the interests of his employer by supporting the union campaign. He was seen to be so acting by the employees with whom he had contact. A number of employees testified

and virtually all of them reflected the view that the company would not be pleased with Mr. Rondana's efforts to unionize its plant. This is not, therefore, a situation where it can be said in any real sense that the company lent any support to the applicant union. There is, moreover, no evidence to suggest that Mr. Rondana exercised any undue influence by virtue of his duties during his support of the union. For the foregoing reasons, at the hearing, the Board dismissed the section 12 allegation and declined, on the strength of the evidence before it, to view the membership evidence as tainted by Mr. Rondana's involvement. The Board therefore declined for that reason, to order a representation vote.

14. The petition in opposition to this application was sponsored by Mr. Frank Kokkoros, a sales representative of the respondent. A preliminary question was the employment status of Mr. Kokkoros, as the union alleged that he exercised managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*. The evidence establishes that Mr. Kokkoros is responsible for approximately fifty per cent of the respondent's sales. He deals exclusively with the chain store accounts, working almost entirely by telephone out of an office in the plant premises. He shares the office with Mr. Emilio Calvitto, the respondent's Traffic Manager.

15. As a salesman he occasionally receives customer complaints about the conduct of drivers who deliver the respondent's soft drink products to customers' stores. While he may sometimes bring those complaints to the attention of the driver concerned, he does not issue any discipline nor recommend any particular action to members of management. If a particular sales account is jeopardized, he does bring the driver's conduct to the attention of management. There is no evidence, however, that he has ever exercised any power of effective recommendation nor any direct authority in respect of discipline. Having regard to the totality of the evidence in respect of Mr. Kokkoros' responsibilities, including certain administrative and clerical functions that he performs, the Board is satisfied that he does not exercise managerial authority within the meaning of section 1(3)(b) of *The Labour Relations Act* and that he is not employed in a confidential capacity in respect of labour relations.

16. In considering whether the petition sponsored by Mr. Kokkoros is a voluntary expression of the employees who signed it, the Board must have concern for the perception employees have of Mr. Kokkoros' role in the plant. He shares an office with the Traffic Manager. He is responsible for half of the company's sales. It is not uncommon for him to give instructions to foremen Rondana and Figueroa when there is a problem about how to fill a particular order if certain stock is missing or where there has been some error made in filling an order. While Mr. Kokkoros' functions may be clerical or administrative without being managerial, it is clear that he is perceived by other employees as being in a position of special proximity to management.

17. Mr. Francisco Leandro, a mechanic employed by the respondent, testified that he was approached by Mr. Kokkoros to sign the petition. Mr. Leandro's evidence, which the Board accepts, is that Mr. Kokkoros said to him that if he did not sign the petition against the union he would be "sent away". Similar evidence was given by Mr. Ross Wheeler. Although Mr. Wheeler is a truck driver and is not part of the bargaining unit in light of the union's late amendment of the application, his testimony is nevertheless significant. At the time of the petition the ultimate composition of the bargaining unit was not known. The evidence is clear that both the union organizers and Mr. Kokkoros canvassed the drivers just as they did the plant employees.

18. Mr. Wheeler testifies that on one occasion he and Mr. Kokkoros had touched on the subject of the union in a conversation in Mr. Kokkoros' office. During that encounter Kokkoros asked Wheeler to tell him who was behind the union and the location of a union meeting that was to take place on the following Sunday. Mr. Wheeler did not give him the information. When Wheeler asked him why he wanted to know, Kokkoros replied that if the union came in it would not matter to him because he was part of management. He explained that he was just curious.

19. Mr. Kokkoros spoke to Wheeler a second time, this time during the circulation of the petition. The date of this encounter is significant in that it goes to the credibility of Mr. Kokkoros' testimony. Mr. Kokkoros testified that he got the idea of the petition from the Form 5 "green sheets" giving notice of the application for certification, which were posted in the plant on April 17, 1980. According to his testimony he did not have knowledge of how to oppose the union before that time. Mr. Wheeler's evidence is firm that Mr. Kokkoros was circulating his petition on either April 15 or 16, 1980, at a time prior to when the company would have posted the notice to the employees about the application for certification.

20. During that encounter Kokkoros asked Wheeler to sign the petition. He told him that he had quite a few signatures and that he had no doubt that he could get other drivers to sign. He explained that he could get them fired, especially those who had been employed for less than three months. He assured Wheeler that he had nothing to fear because he had been employed for more than three months.

21. The evidence establishes that in the circulation of his petition Mr. Kokkoros engaged in threats to the job security of individual employees amounting to breaches of section 61 of *The Labour Relations Act*. On the basis of such evidence the Board can attach no weight whatever to the petition which Mr. Kokkoros sponsored. That document does not therefore cause the Board to order the taking of a representation vote among the employees in the bargaining unit.

22. Having regard to the agreement of the parties the Board finds that all employees of the respondent employed at, or working out of the company's plant at Metropolitan Toronto, save and except foremen, supervisors and persons above the rank of foreman and supervisor, and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

23. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on April 22, 1980, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act*, to be the time fixed for the purpose of ascertaining membership under section 7(1) of the said Act.

24. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER B.L. ARMSTRONG:

1. In concur with the majority that no weight should be attached to the petition against the application for certification.

2. I also concur with the disposition of the application by the issuance of a certificate to the applicant union on the basis that more than fifty five percent of the employees of the respondent in the bargaining unit were members of the applicant at the time of the application.

3. However, I dissent from the majority decision to include Mr. Kokkoros in the bargaining unit. On the basis of all the evidence, I am of the view that, Mr. Kokkoros is exercising managerial functions within the meaning of Section 1(3)(b) of *The Labour Relations Act*. I would have to excluded him from the bargaining unit.

1759-79-M International Union of Elevator Constructors, Local 50, Applicant, v. National Elevator and Escalator Association, Respondent.

Arbitration – Lay-off out of seniority – Agreement allowing retention of mechanics having necessary skill and ability to do remaining work – Whether referable to all work done by all mechanics or work performed by most junior mechanics – Whether changes in work assignments and training periods required – Standard of aribtral review considered

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Pamela Sigurdson and Wm. Morran for the applicant; R. R. Dunsmore and Ian Saint for the respondent.*

DECISION OF THE BOARD; August 25, 1980

1. The name “Otis Elevator Company Limited and National Elevator and Escalator Association” appearing in the style of cause of this application as the name of the respondent is amended to read “National Elevator and Escalator Association”.

2. The applicant has referred to the Board a grievance concerning the interpretation, application or alleged violation of a collective agreement for final and binding arbitration. It is a referral made under section 112a of *The Labour Relations Act*.

3. The applicant and Otis Elevator Company Limited (“Otis”), at all material times, were bound to a collective agreement entitled the Ontario Provincial Agreement (“the Agreement”) between the respondent and The International Union of Elevator Constructors (“the Union”) which expired April 30, 1980. The agreement is a provincial agreement within the meaning of section 125(3) of the Act insofar as it applies to the industrial, commercial and institutional sector of the construction industry referred to in section 106(e) of the Act. The respondent is the designated employer bargaining agency for Otis and the other employers bound by the Agreement and the Union is the designated employee bargaining agency for the applicant and Locals 50, 90 and 96 of the Union.

4. The applicant alleges that Otis violated the Agreement when, during a shortage of work, it retained in employment two elevator constructor mechanics (“mechanics”), Messrs.

R. Crawford and J. Wenzel, while mechanics having greater seniority were laid off. At the time this matter first came on for hearing, all of the mechanics alleged to have been affected had been recalled to work. The applicant is seeking to have them reimbursed for all compensation lost and to have their seniority credited with the time lost from the alleged, wrongful lay-off. The applicant agrees that they were recalled from lay-off in the correct order.

5. Otis, as a result of a shortage of work, laid off 16 mechanics out of a group of 18 between October 3, 1979 and November 8, 1979. Two of these mechanics had more seniority than Crawford and all of them had more seniority than Wenzel. One mechanic, Mr. M. Heaney, obtained employment with another employer in the elevator industry during the lay-off and was not recalled, the other 15 were recalled by Otis between November 20, 1979 and January 7, 1980. The applicant contends that the lay-offs were conducted contrary to the provisions of clause 10.15 of Article 10, Training – Qualification – Employment – Lay-off-Recall of the Agreement which reads as follows:

“In the event that lack of work requires a reduction in the number of employees in the employ of an employer, employees shall be laid-off in the following order:-

- (a) Probationary Helpers I, without regard to seniority, (1st block to be laid off).
- (b) Probationary Helpers II, without regard to seniority. (Second block to be laid off.)
- (c) Helper I, without regard to seniority. (Third block to be laid off.)
- (d) Helper II, without regard to seniority. (Fourth block to be laid off.)
- (e) Improver Helpers without regard to seniority. (Fifth block to be laid off.)
- (f) Mechanics in seniority, provided the Employers remaining Mechanics have the necessary skill and ability to do the work that remains.

The mechanic facing lay-off may accept assignment as an Improver Helper or take a lay-off.

There shall be no industry-wide bumping except that Mechanics may bump Temporary industry-wide basis. Helpers may bump Probationary Helpers on an industry-wide basis.

Notwithstanding the foregoing provisions of 10.15, an employee has no seniority rights with an employer for a period of six (6) months after commencing work with that employer. After the six (6) month period, full seniority rights will be credited with the new employer. In the event of a reduction in the work-force with that employer during this six (6) month period this employee will be the first to be laid-off with the exception of Probationary Helpers.”

6. Other relevant sections of the Agreement read as follows:

“Article 2 RECOGNITION CLAUSE

2.01 The Employers recognize the Union as the exclusive bargaining representative for all Elevator Constructor Mechanics and Elevator Constructor Helpers, in the employ of the Employees engaged in the installation, repair, maintenance and servicing of all equipment referred to in Article 4.02 and Article 4(A).

2.02 The Union recognizes that it is the responsibility of the Employers, in the interest of the purchaser, the Employers and their employees, to maintain the highest degree of operating efficiency to obtain better quality, reliability, and cost of its product, provided, however that this provision is not intended to affect the work jurisdiction specified in Article 4 and Article 4(A), and the work jurisdiction as specified in other Articles of this Agreement.

2.03 Without limiting the generality of the foregoing, and subject to the other provisions of the Agreement, the Employers shall have the right to:

- (a) Select personnel, hire, assign work or duties, transfer, layoff and recall employees;
- (b) discipline or discharge for just cause;
- (c) establish and enforce reasonable rules or conduct to be observed by employees.

Article 4 WORK JURISDICTION

4.01 It is agreed by the parties to this Agreement that all work specified in Article 4 shall be performed exclusively by Elevator Constructor Mechanics and Elevator Constructor Helpers in the employ of the Employers.

Article 5 WAGES

5.01 Hourly wage rates in effect from time to time in each locality throughout the life of this Agreement shall be determined in accordance with the provisions of this Article.

5.02 The hourly wage rate for each classification of employees shall be derived from the hourly wage rate for the Mechanic in each locality and the hourly wage rate for the said Mechanic shall be derived from the wage rates for the principal building trades in each locality, all as provided for herein.

5.09 When four (4) or more employees, including the Mechanic-in-

charge, are employed on a New Construction or Moderization job, the Mechanic-in-charge of the job shall have his hourly rate increased twelve and one half per cent (12½%) for each hour worked by him.

5.10 The hourly wage rate for a local representative shall be one hundred and twelve and one-half per cent (112½%) of the Mechanic's rate, as per Article 9.09.

5.12 Wage rates as established by the provisions of this Article shall apply to all Mechanics and Helpers engaged in construction, repair, modernization and contract service work as defined in and covered by this Agreement.

Article 7 CONSTRUCTION WORK

7.01 Construction work is hereby defined as erecting and assembling of apparatus as enumerated in Article 4 of this Agreement, except general repairs and modernization as defined in Article 8.02 and 8.05. It is hereby agreed that all Construction work as above defined shall be performed exclusively by Elevator Constructor Mechanics and Helpers.

Article 8 REPAIR WORK

8.01 Repair work is hereby defined as general repairs and modernization work on apparatus enumerated in Article 4 and Article 4(a) of this Agreement. Repair work shall be exclusively performed by Elevator Constructor Mechanics and Helpers.

8.03 An Employer may assign an Elevator Constructor Mechanic without a Helper to repair work where such repair work may not require two (2) men and no factor of safety is involved in a one-man operation, provided that the Area Employer Committees agreed to a list of such one man repair work.

8.05 A modernization job is hereby defined as any work performed on apparatus enumerated in Article 4 and Article 4(A) in any existing or occupied building to bring equipment up to date, except general repairs and Contract Service work.

Article 9 CONTRACT SERVICE

9.01 Contract service is hereby defined as any contract obtained by an Employer for regular examination or care of apparatus enumerated in Article 4 and Article 4(A) of this Agreement, for a period of not less than one (1) month. Contract Service work shall be exclusively performed by Elevator Constructor Mechanics and Elevator Constructor Helpers.

9.02.01 One (1) Helper to each four (4) Mechanics may be employed. Such a Helper may work alone under the supervision of a Mechanic in the district. When working alone, he shall be employed on cleaning, oiling, and greasing work only. The word "district" means the regular contract service route of the Mechanic or contract service route of the Mechanic or contract service route of the Mechanic or Mechanics to whom the Helper has been assigned that day.

9.02.02 When an Employer obtains a contract that requires a Mechanic and Helper to be on the job and/or in a building at all times during the regular weekly working hours, such Helper shall not be considered as part of the one (1) to four (4) agreement mentioned above, provided no Probationary Helper is assigned to such regularly scheduled work.

9.08.01 It is mutually agreed that, for the benefit of the elevator industry, and having particular concern for the safety of the using public, a special obligation exists on the part of employees engaged in Contract Service to answer call-backs outside of regular working hours. To ensure that the needs of the industry along these lines may be adequately covered, a voluntary standby list shall be established by mutual accord of each Joint Employment Committee, the Local Union Business Representative, the Employer and the maintenance personnel concerned with the responsibilities recognized in this Article.

9.08.02 The Employer shall have the option of paying standby under one of the following three (3) methods if a standby list is necessary:

• • •

- c) - Mechanics assigned a duty period of seven (7) days will receive standby at the rate of 112½% of the Mechanics rate for all hours worked whether straight time or the overtime rate for that period of time that he is on standby.

Article 10 TRAINING - QUALIFICATION - EMPLOYMENT LAYOFF - RECALL

10.01 It is agreed by the Union that there shall be no restrictions placed on the character of work which a Helper may perform under the direction of an Elevator Constructor Mechanic. (However, a Helper on Contract Service work is subject to the provisions of Article 9.)

10.02 The total number of Helpers employed shall not exceed the number of Elevator Constructor Mechanics on any one (1) job, except on jobs where two (2) teams or more are working, one (1) extra Helper may be employed for the first two (2) teams and an extra Helper for each additional three (3) teams.

Further, the Employer may use as many Helpers as best suits his con-

venience under the direction of a Mechanic in wrecking old plants and in handling and hoisting material; and on foundation work. When removing old and installing new cables on existing elevator installations, an Employer may use two (2) Helpers to one (1) Mechanic.

10.03.01 Probationary Helper 1: A newly hired Employee without elevator experience shall be classified as a Probationary employee in the status of Probationary Helper 1 for a period or periods totalling six (6) months within the aggregate period of not more than nine (9) months.

The probationary period may be worked with more than one Employer. He shall be at least 18 years of age, physically fit and possess a high school certificate or its equivalent education. He shall receive 55% of the Mechanic's rate.

10.03.02 Probationary Helper 11: Upon completion of six (6) months in the industry, to the satisfaction of the Employer and the Union, a Probationary Helper shall be reclassified as a Probationary Helper 11. For... , if available.

He shall receive 60% of the Mechanic's rate and shall be entitled and be required to participate in the make contributions to the Welfare Plan and the Pension Plan as provided for in this Agreement. He... this.

10.04 Helper 1: Upon Completion of twelve (12) months in the industry the employee will be re-classified as a Helper 1.

The Helper 1, shall remain in this classification for a further twelve (12) months in the industry. He shall receive 70% of Mechanic's rate.

10.05 Helper 11: Upon completion of twenty-four (24) months in the industry the Helper 1 shall be re-classified as a Helper 11.

He shall receive 75% of Mechanic's rate.

The Helper 11, shall remain in this classification for a further period of twelve (12) months in the industry.

10.06 Improver Helper: Upon completion of thirty-six (36) months in the industry, a Helper 11 shall be re-classified as an Improver Helper.

The Improver Helper shall remain in this classification for a further period of twelve (12) months in the industry. He shall receive 80% of Mechanic's rate.

10.07 MECHANIC: Upon completion of forty-eight (48) months in the industry and successful completion of the C.E.I.E.P., and Improver Helper shall write the Mechanic's exam as set out by the C.E.I.E.P. Trustees.

10.09 Temporary Mechanic: Shall mean the Improver Helper who may be raised to the status of Temporary Mechanic under agreement of his Employer and the Union Representative.

If an Improver Helper is raised to the status of Temporary Mechanic he may remain as a Temporary Mechanic as long as satisfactory to the Employer and the Union, provided that there are no Mechanics unemployed.

Helper 11 and then Helper 1 may be raised to Temporary Mechanics, provided that all Improver Helpers are working as Temporary Mechanics, under Agreement of the Employer and the Union.

10.10 (in part)

It is understood that probationary employees as mentioned in Article 10.10 may during the probationary period be discharged or laid off by the Employer at any time with or without cause, and no reason need be assigned therefore and no such discharge shall be construed as a grievance.

10.13 An Employer shall use the Local Union as a first source of job applicants. In the event that the Local Union is unable to satisfy satisfactorily the Employer's request within three (3) working days, the Employer may obtain applicants from any other available source. Before commencing work such applicants will obtain a referral slip from the Local Union which shall be granted by the Local Union. The Employer has the right to reject any applicant referred to him by the Local Union, however, a claim that the Employer has unreasonably rejected such an applicant may be the proper subject matter of a grievance.

10.14 Seniority of an employee is his total length of service in the industry in Ontario. Seniority shall not accumulate during a lay-off and seniority shall be deemed to be broken if the employee does not work under covered employment for nine (9) consecutive months.

Seniority shall accumulate if an employee is sick and covered by the Welfare and Pension Plan for a period of up to one (1) Year. Following an illness in excess of twelve (12) months an employee's seniority date shall be adjusted in accordance with the provisions of Article 10.14.

Seniority shall accumulate if an employee is disabled and is on Workmen's Compensation and is receiving weekly compensation benefits.

Seniority shall not be broken but shall not accumulate while an employee is on an official leave of absence.

Seniority shall not be broken but shall not accumulate if an employee

is promoted to a supervisory position (supervising bargaining unit employees). A Union Representative elected or appointed, during the term of office, shall maintain and accumulate seniority.

Seniority shall not be deemed to be broken or may be deemed to accumulate if the Joint Employment Committee agrees that any circumstances not covered by this paragraph shall not be grounds for breaking an employees' seniority.

Seniority shall accumulate for any period a bargaining unit employee is assigned to work for the Employer outside the Province on Ontario.

10.16 The recall of employees laid off by an Employer (or Mechanics assigned to the Improver Helper rate) shall be in the reverse order of the lay-offs made in accordance with this Article. The Employer shall be obligated to recall laid-off employees and the recall rights shall be limited to a period of six (6) months. An employee shall at his option accept or reject a recall to his former employer. A rejection of recall terminates an employee's recall rights.

10.17 The lay-off provisions of this Article shall not apply to an employee appointed as a Local Representative as long as the employee is carrying out the duties of a Local Representative."

7. The parties are agreed on the elementary facts of the lay-off: the names of the 16 mechanics involved; their seniority; the dates of lay-off and recall for each; and that, when the lay-offs commenced, there were only mechanics employed. In other words, sub-clauses (a), (b), (c), (d) and (e) of clause 10.15 to the extent that they were applicable, had been complied with. When the lay-offs started, there were some mechanics affected who already had accepted assignments as an improver helper pursuant to the provision in clause 10.15 which states: "The mechanic facing lay-off may accept assignment as an Improver Helper or take a lay-off.". That situation does not signify that those mechanics are not grieving the conduct of the lay-off.

8. The applicant contends that, since there were only mechanics employed at the time the lay-offs began, sub-clause (f) of clause 10.15 governed Otis' conduct of the lay-off and required it to lay-off the most junior mechanic or mechanics needed to accomplish the reduction and permitted it to depart from strict seniority only if the mechanics remaining did not have sufficient skill and ability to do the work which remained to be done at the time of the lay-off. Counsel for the applicant argues that the clause does not distinguish between mechanics by reference to the type of work they do (such as construction mechanic, repair mechanic or contract service mechanic), nor does the language set up a contest between the remaining mechanics such that seniority would govern only if their skills and ability were relatively equal. Counsel argues further that the modifying adjective "necessary" in the clause means that it is the skill and ability which is needed by a reasonable standard to do the "work that remains" and the reasonable standard is sufficient skill and ability to do the work. This argument implies that "the work that remains" is *any* of the work of mechanics regardless of who is doing it, which kind of work it is (see paragraph 10) or what is the seniority of the employee doing it. In other words, if a senior mechanic does not have the necessary skill and ability to do the work of a junior mechanic whom the employer is proposing to retain, but has

the necessary skill and ability to do any of the work remaining to be done by mechanics as of the date of lay-off, that mechanic has a right to be assigned to that work and the employer must make the work reassignments necessary to make that work available and to eliminate the junior mechanic. Counsel maintains that because Otis was dealing only with persons who were classified as mechanics, it was dealing with persons who are qualified to do the work of mechanics which remained. Thus it should have conducted the lay-off by strict seniority producing the results indicated below under the date of lay-off heading "By Strict Seniority" instead of the result shown under the heading "Actual". Counsel acknowledges that some re-assignment of mechanics may be necessary to accomplish this but maintains that is a requirement implicit in the language of 10.15(f).

<u>Name</u>	<u>Seniority</u> <u>Yrs./Mos./Days</u>	<u>Actual</u>	<u>Date of Lay-off</u> <u>by Strict Seniority</u>
Wenzell, J.	7 - 3 - 0	retained	Oct. 3, 1979
O'Neil, T.	7 - 7 - 1	Oct. 3/79	Oct. 3, 1979
Fletcher, M.	7 - 8 - 0	Oct. 18/79	Oct. 3, 1979
Briscoe, W. R.	7 - 10 - 12	Oct. 3/79	Oct. 18, 1979
Duggan, M.	8 - 0 - 3	Oct. 3/79	Oct. 18, 1979
Smith, R.	8 - 3 - 1	Oct. 18/79	Oct. 18, 1979
Power, A.	8 - 6 - 0	Oct. 18/79	Oct. 18, 1979
Langan, P.	8 - 6 - 0	Nov. 8/79	Oct. 18, 1979
Roy, M.	8 - 8 - 0	Oct. 22/79	Oct. 22, 1979
Heaney, M.	8 - 8 - 0	Oct. 18/79	Oct. 25, 1979
Poole, D.	8 - 8 - 1	Oct. 18/79	Oct. 25, 1979
Connell, G.	8 - 8 - 1	Oct. 25/79	Oct. 25, 1979
Busato, J.	8 - 9 - 2	Oct. 25/79	Oct. 25, 1979
Piper, D.	8 - 10 - 3	Oct. 2/79	Nov. 2, 1979
Racz, T.	8 - 11 - 0	Oct. 25/79	Nov. 2, 1979
Crawford, R.	8 - 11 - 1	retained	Nov. 8, 1979
Price, C.	9 - 0 - 2	Nov. 2/79	retain
Donegan, M.	9 - 2 - 0	Nov. 2/79	retain

9. Counsel for Otis maintains that clause 10.15(f) must be viewed in the context of the entire Agreement and particularly clauses 2.02 and 2.03, the latter one being a management rights clause which, amongst other things, gives Otis the right to "Select personnel, . . . assign work or duties, . . .". That language, in the absence of any restricting language in the Agreement, counsel further maintains, gives Otis the unfettered right to select personnel and assign work or duties within the mechanic classification and to do that, pursuant to its responsibility under clause 2.02, in a manner which will ". . . maintain the highest degree of operating efficiency. . .". Thus according to counsel, a mechanic who is subject to lay-off while other mechanics with less seniority are being retained can only require Otis to retain him if he can do immediately all of the work remaining to be done by mechanics and do it to the highest degree

of efficiency. Counsel argues that it is not just the work which is being done by the lower seniority mechanics which he must have the necessary skill and ability to do, nor is it just the work which remains on the date of the lay-off, he must have the necessary skill and ability to do all of the work that remains to be done by mechanics after the lay-off. This proposition is at the opposite pole to that of the applicant and, if applied to the situation on November 1, 1979 when the two most senior mechanics, Donegan and Price, were laid off, it would seem to produce the following results. Since three employees with less seniority, Wenzel, Langan and Crawford, were being retained, Donegan and Price in order to displace two of them, would not only have to possess the necessary skill and ability to do the work that remained to be done by those two, but would have to have the necessary skill and ability to do all of the work that remains to be done by mechanics following their lay-off. Counsel argues that such application of clause 10.15(f) is essential to the maintenance of a flexible workforce of mechanics; that flexibility is critical to Otis' ability to meet its responsibility under clause 2.02 to maintain the highest degree of operating efficiency; and, that the maintenance of flexibility becomes increasingly important as the size of the workforce reduces.

10. Articles 7, 8 and 9 of the Agreement define three major kinds of work: construction (Article 7), repair (Article 8), which is further sub-divided into general repairs and modernization, and contract service (Article 9). Thus the Agreement recognizes that four kinds of work exist in the industry and, according to those three articles, that work is to be "... performed exclusively by Elevator Constructor Mechanics and Helpers". In addition, the evidence reveals that Otis has organized its work to use mechanics to do what it terms "adjusting" work and mechanics who are assigned to it are termed "adjustors". For ease of reference, the term of "adjustor" will be used in this decision to refer to mechanics who are assigned to adjusting work. While the parties are agreed that this situation does exist and has for many years, the applicant correctly contends that the Agreement contains no reference to adjustors or adjusting or to mechanics doing this type of work, but only to mechanics without differentiation as to the type of work which they perform. Therefore, according to the applicant, Otis cannot make a distinction between a junior mechanic who is an adjustor and a more senior mechanic who is not in order to justify retaining the junior one in preference to the other when one of them must be laid off. The applicant does not dispute that adjustors are paid at the premium rate of 112½ per cent of the mechanic rate, notwithstanding that the agreement makes no provision. The Agreement does provide for that same premium to be paid to mechanics-in-charge on construction or modernization jobs and to mechanics who are appointed local representatives for employers or who are on seven-day stand-by call.

11. Although adjustors are used primarily on new construction, they also work on major repair and modernization jobs and sometimes do trouble shooting for contract service, so they cross over all four kinds of work in the Agreement. Their task, generally stated, is to get the equipment to operate the way it was ordered by the customer. More particularly this involves such tasks as assuring that the programs which determines the sequences and speed of operation of the equipment are functioning according to plan; that safety mechanisms are working; that the equipment is operating up to the designed speed and assuring that the installation is ready for and passes inspection as required by the relevant regulations. This work involves diagnosing the cause of problems in the operation of the equipment and resolving the problems. In the words of one mechanic, David Young, a witness for the applicant who was an adjustor for Otis for 10 years, it is "the most sophisticated job in the industry". This witness has not worked as an adjustor for the past two years and when he

started 12 years ago it took him four months training before he could begin to work alone, although by then he had 12 years experience in construction and contract service work. It is clear from the evidence of Young and two other witnesses, Robert Alldis, previously a working foreman in adjusting for Otis, who testified for the applicant and Norman Hartley, construction superintendent for Otis and the manager whose responsibility for construction includes the management of the adjustors, that mechanics are carefully selected to become adjustors based on their all round ability in the elevator industry, the quality of their work in construction installation and/or contract service work, personal aptitude for the work and particularly their knowledge of electrical circuitry. It is not possible to accurately ascertain from the evidence how long it takes to train an adjustor to the stage when he can work alone on all of the different types of equipment. Young said it was four months before he worked by himself, but his evidence does not indicate the range of equipment which he could handle. Alldis, who has done adjusting and/or supervised the work for twenty-five years, made reference to one mechanic, who had training as an adjustor, needing two to three months training on one kind of equipment to round out his training. While this was Otis' most sophisticated in an extensive range of equipment, Alldis' evidence suggests that four months training is just a foot on the ladder. Hartley maintained that a new mechanic with the aptitude for the work, who has studied advanced electrical circuitry, would need six years to develop into an adjustor capable of working alone on all Otis equipment and to perform all aspects of the work.

12. At the time of the lay-off, all but one of the laid off mechanics had come from construction work. Construction activity was almost non-existent so that, for all practical purposes, the work that remained was general repair, modernization and contract service work. There are 17 to 18 repair crews scheduled for two months work, and 57 contract service routes in operation within Local 50's territorial jurisdiction at the time of the lay-off. Crawford was employed as a contract service mechanic on the CN Tower throughout the lay-off and Wenzell was working as an adjustor on a modernization project in Montreal. The applicant put little evidence before the Board as to the ability of any of the 16 employees who were laid off to replace either Crawford or Wenzell. None of the grievors testified and what little evidence there is came from Alldis and from William Morran, business manager for Local 50, who worked in the elevator industry from 1956 until 1972, including having worked for Otis as a mechanic on contract service work and as an adjustor. Most of the mechanics with whom Alldis had worked within the past two years had been working as improver-helpers in construction. Except for Donegan, whom he believed would be satisfactory as a contract service mechanic, Alldis did not know the ability of the others well enough to say whether they could perform satisfactorily in that work or replace Wenzell. Donegan could not replace Wenzell. Morran was of the opinion that G. Connell, M. Fletcher, P. Langan and M. Roy, as qualified mechanics, could replace Crawford on the CN Tower. He thought C. Price could also replace Crawford but would be less efficient than Crawford. He was uncertain where Donegan might be placed because most of his experience was in construction and he was best there, although his first assessment of Donegan was the same as his assessment of Price. Paul Meyer, who was contract service mechanic on the CN Tower for three and one-half years prior to Crawford, said it would take approximately a day for a new mechanic to familiarize himself with where the equipment is. It would take substantially more time to get up to full or normal efficiency. Since the elevators are a source of revenue for this client of Otis, it was important that the mechanic be able to quickly solve problems which put elevators out of operation. Meyer also testified that the selector drivers on the elevators were one of six of that kind in use

in North America. This and some other differences in the equipment required somewhat different problem solving skills than other elevator installations. David Young was an adjustor on the CN Tower during its construction and also testified that the equipment in the CN Tower was different from other installations, but not in respect of the programs controlling the operation of the elevators. He stated that it was a difficult building for getting to know where the various equipment and controls are located. It would depend on what changes had been made since he last worked on the CN Tower as to how long it would take him to become familiar with the operation again.

13. James MacLean, who, when the lay-off started, had been service superintendent for Otis for 18 years and in that capacity is responsible for general repairs, modernization and contract service work testified as to the skill and ability of the laid off mechanics. His general assessment was that none of them was qualified at the start of the lay-off to work as a mechanic on a contract service route. Some could qualify in three months after working with a contract service mechanic to learn routines followed in that work. None, in his assessment, was qualified to do adjusting work. His evidence in examination-in-chief and cross-examination as to the skill and ability of the individual mechanics on the lay off list to work as mechanics on contract service routes was consistent with his general assessment. In respect of the contradictions between his assessment and that of Morran as to the skill and ability of the laid off mechanics, the Board prefers MacLean's evidence. Morran has not worked in the trade since 1972 and, although his full-time employment by Local 50 since then has required that he remain current in his general knowledge of the trade and the capabilities of the members for whom he is responsible, MacLean is responsible for the on-going management of the mechanics performing contract service work for Otis. Moreover, MacLean's evidence was more specific as to the actual experience on contract service work, or the absence of it and, of course, he is responsible for the maintenance routines which they must carry out and is in a better position to know whether they have the skill and ability to do so. For the same reason, the Board prefers MacLean's evidence to that of Alldis' in respect of Donegan. While Alldis' evidence deserves weight because of his long experience in the industry, his knowledge of Donegan comes from working with him on construction. Furthermore, while Alldis once had supervisory responsibility for contract service work, he has not had any direct responsibility for more than 10 years and his knowledge of the current work routines would be limited compared with MacLean who is wholly responsible for them. The Board, therefore, finds that none of the laid off mechanics were, at the time of their lay-offs, able to replace Crawford or any other contract service mechanic without further training.

14. The Board heard significantly more evidence about the ability of mechanics who were not on the lay-off list to replace Crawford and Wenzell, evidence which is relevant to the applicant's interpretation of clause 10.15(f). On that evidence, the Board finds as follows.

15. During the past six years in Toronto, Otis has used electronic systems to control the programs which operate some of its new elevator installation which employ "solid state" electronic technology. The first major installation using this technology is First Canadian Place in the downtown core of Toronto. The present state of skill development on solid state technology of the adjustors is such that only Wenzell and one other mechanic, Mr. W. Bowler, could work alone on control equipment employing that technology. Even Alldis excludes himself from having that skill. There were six mechanics on the current seniority list of Otis employees working as adjustors in November, 1979: R. Alldis, R. Boag, W. Bowler, M.

Brauer, C. Nagy, F. O'Neil and D. Robinson. Except for Robinson, all could replace Wenzell on the project on which he was employed in Montreal during the period of the lay-off allowing no more time for familiarizing themselves with the project than Wenzell took. There were three other mechanics (in addition to Young) who have experience on adjusting but who were not capable at the time of the lay-off of working alone on all types of equipment handled by Otis. One would require at least two to three months additional training, the other two substantially more. Young is not skilled to work on solid state technology and, after two years away from working as an adjustor (although, because of his experience, he does some adjusting of the equipment on his contract service route), would not have the skill and ability to adjust on new equipment on which he has had no prior experience.

16. In respect of contract service work, the evidence on balance indicates that either Meyer or Young could replace Crawford as mechanic on the CN Tower, although they would need at least a day to re-familiarize themselves with the premises. The more difficult question is who would replace the one that replaced Crawford. MacLean testified that there were some 20 to 30 contract service mechanics who would replace Young, but he would have to make four or five sequential moves to accomplish the replacement over a period of two to three weeks. Yet the Board is satisfied on the evidence of Meyer, Morran and Young that Otis has from time to time transferred mechanics from repair work to contract service or from one contract service route to another without having them work along with another mechanic for a period of familiarization. In fact Meyer was transferred to his present route from the CN Tower without anyone showing him around the buildings for which he is responsible. This is not to say that every mechanic could be similarly deployed, but where Otis assesses this skill and ability to permit such a move, the move is made. While the Board has no evidence that Mayer could be replaced in the same manner as Young, it is satisfied from MacLean's evidence on replacing that it could be done.

17. Although MacLean testified as to the experience of some of the laid off mechanics on general repair or modernization work, the applicant did not call any evidence which might support a claim that general repair or modernization mechanics could be transferred to contract service work in order to provide a place for two grievors with the requisite skill and ability to do the modernization or general repair work that remains.

18. The Board, in turning to the task of determining whether Otis violated clause 10.15(f) of the Agreement by retaining Crawford and Wenzell while it laid off more senior mechanics, is constrained to observe that the language of the clause bears a close resemblance to seniority language dealing with lay-offs which for many years has been found in collective agreements outside of the construction industry. It is not unusual language, but seniority language, perhaps more than other provisions of collective agreements, becomes imbued as it matures, with a meaning that is "personal" to the parties to the particular agreement. Thus applications of the language which once would have raised a dispute between the parties becomes accepted practice. In the instant case, the language has not had a chance to mature for the provisions contained in Article 10 of the Agreement (particularly clause 10.15) are, for the most part, the first such provisions negotiated by the parties. Some similar provisions were contained in Article X (A) of the predecessor collective agreement. That collective agreement was the product of an arbitration award, colloquially referred to as the "Anderson Award", rendered on February 28, 1974, pursuant to *The Elevator Constructor Unions Disputes Act, 1973*, which was enacted by the legislature of Ontario because of a labour dispute between the predecessor of the Association and the Union. Some of the provisions of Article X (A) were

later modified by an unreported decision of O.B. Shime, Q.C., sole arbitrator, who was appointed pursuant to terms of the Anderson Award. In view of that history and while it is reasonable to conclude that the parties put their minds to the task at hand when they negotiated the language of Article 10, the Board believes that it must be cautious to balance its obligation to resolve the dispute before it with the need to leave the parties sufficient latitude within which to apply this new language to new situations as they arise and to do so within the context of the other provisions of the Agreement with which they have the benefit of long experience not enjoyed by any arbitrator.

19. Clause 10.15 of Article 10, the one giving rise to this referral, standing alone clearly provides for a sequential system for laying off employees of an employer "In the event that lack of work requires a reduction in the number of employees in the employ of [that] employer, ...". Items (a) through (e) call for each one of five grades of helpers to be laid off before mechanics are to be laid off pursuant to clause 10.15(f). That is the point in the lay-off sequence which Otis had reached when the lay-offs which are the subject of this referral started. The fact that some of the mechanics named on the list referred to in paragraph 8 above had already accepted assignments as an Improver Helper in accordance with clause 10.15(f) by the time these lay-offs began infers that clause 10.15(f) had already been applied in an earlier lay-off. Turning then to the language of clause 10.15(f), in spite of the apparent ambiguity of the phrase "Mechanics in seniority,..." which begins the clause, the parties do not dispute that it means the order of lay-off for mechanics in the reverse of their seniority; that is, the mechanic with the least seniority is the first to be laid off. It is the qualifying proviso of the remainder of the clause which is the source of the dispute. On its face the qualification is simply one which requires that the most senior mechanics who "... have the necessary skill and ability to do the work that remains" are to be retained. That language, as so often is the case in seniority clauses in collective agreements, places a limitation on the application of straight seniority to (in our case) lay-offs by the requirement of ability to perform the work. That requirement is distinct from the one which sets up a competition between two or more claimants for the remaining work. See, for example, the often cited observations of Professor Laskin, as he then was, in *Re U.A.W. and Westeel Products Ltd.* (1960), 11 L.A.C. 199:

"Two alternative themes are generally found in seniority articles. Under one, seniority is qualified in greater or lesser degree by a requirement of ability or competence to do the required work. In such case, a senior man who is equal to the job is entitled to it, although there may be a junior applicant who can do it better. The other theme involves a contest between competing applicants, and seniority governs only when their competence or ability is relatively equal."

The problem with the definition of the ability qualification in clause 10.15(f) is the question of what constitutes "the work that remains". The problem, which is evident from the polarized arguments of the parties, is that the language reasonably bears more than one interpretation. The Board must decide the proper interpretation before it can determine whether Otis has violated the Agreement by retaining Crawford and Wenzell.

20. Before turning fully to that task, there is a problem with the word "Employers" appearing in clause 10.15(f); it obviously is meant to be a possessive adjective and is missing the apostrophe. Since the Agreement is for multiple employers and it refers in various articles as required to employer and employers, it is necessary to settle whether the 10.15(f) reference is

intended to be singular or plural. On the basis that the opening phrase of the clause is clearly referring to a single employer, the remainder of the clause refers to employer in the singular and the second paragraph following 10.15(f) excludes bumping between two or more employers, the Board concludes that the word "Employers" in clause 10.15(f) should read "Employer's".

21. Applicant counsel relies primarily upon the wording of clause 10.15 standing alone for support of the applicant's interpretation. It does not stand alone in the Agreement, however, and must be read subject to the other provisions of the Agreement. Quite apart from any other inherent management rights which may reside with the employers bound to the Agreement, item (a) of clause 2.03 specifically recognizes the employers' right to "Select personnel, hire, assign work or duties, transfer, lay-off and recall employees;" subject to the other provisions of the Agreement. Clause 2.03 begins with the words "Without limiting the generality of the foregoing," which refers at least to the preceding clause 2.02 in which "The Union recognizes that it is the responsibility of the Employers, in the interest of the purchaser, the Employers and their employees, to maintain the highest degree of operating efficiency. . .". Thus when a single employer, Otis, is assigning work or duties, or laying off and recalling employees, it must do so subject to Article 10, amongst other provisions of the Agreement, and it must do so without limiting the generality of its recognized responsibility to maintain the highest degree of operating efficiency. The assignment of work and duties is further subject to Article 4 - Work Jurisdiction and Article 4-A - Systems, Modular and Industrial Structures, as well as by Articles 7, 8 and 9 as referred to in paragraph 10.

22. Clauses 10.15 and 10.16 are the only clauses in Article 10 which deal with the application of seniority and, except for limited reference elsewhere in the Agreement to certain rights or obligations which accrue upon an employee completing his probationary period, there are no other references in the Agreement to the application of seniority. Therefore, it is only Otis' right to lay off and to recall employees in clause 2.03(a) that is limited by seniority. Its right to select personnel, hire, assign work or duties and transfer employees is not restricted by seniority, nor is it restricted in any material way by Article 4, 4-A, 7, 8 and 9 except insofar as those articles define the work that is included within the scope of the Agreement and require it to be performed by employees who are bound by the Agreement or set certain limits on the use of helpers or temporary mechanics. For all practical purposes, these few limits excepted, Otis has an unrestricted right, then, to select, hire, assign work or duties to, and transfer mechanics. It follows, therefore, that as long as Otis lays off mechanics "in seniority" and recalls them from lay-off pursuant to clause 10.16 "... in the reverse order of the lay-offs made in accordance with this Article", its right to assign work or duties to mechanics or to transfer them at the time of a lay-off or recall is not otherwise restricted. Hence Otis has the right to make transfers and/or change work assignments, or *not* to do so, in order to discharge its responsibilities under clauses 10.15 and 10.16.

23. Furthermore, if applicant counsel's "make room" argument was to prevail it would result in the senior mechanic who is claiming the work relying not on his seniority but on Otis exercising its right to assign work and transfer mechanics to enforce the higher seniority of one or more other mechanics by having them claim the job or jobs of other mechanics so that the initial claimant could ultimately claim the job of a junior mechanic. In the absence of any specific requirement to that effect in the Agreement, there is no support for the proposition that the grievors' seniority rights operate to cause Otis to restructure its work assignments in the manner contended by the applicant. Nor, in the absence of any specific requirement in the

agreement, is there any support for the proposition that Otis has to “make room” by providing a training period at the time of lay-off to enable an employee who is claiming a job to acquire the requisite skills to do it. That sort of proposition has long been rejected by arbitrators, unless the agreement provides to the contrary, because to require that to be done would pose an unrealistic burden on the employer. (See *Canadian Trailmobile Ltd.*, (1975) 10 L.A.C. (2d) 92 (Adams) at pp. 101 and 102 and the cases cited therein).

24. Notwithstanding that conclusion, Otis’ right in clause 2.03 to lay off mechanics has been tempered by clause 10.15(f), as has the responsibility placed upon it by clause 2.02 “. . . to maintain the highest degree of operating efficiency . . .” and they cannot be relied upon by Otis to override the undertaking in clause 10.15 (f) to lay off mechanics by seniority. That obligation, though, is tempered in turn by the qualification that Otis’ remaining mechanics “. . . have the necessary skill and ability to do the work that remains.” And it is this qualification that is at the heart of the dispute. What does it mean? Whose responsibility is it to apply in this Agreement?

25. In respect of the first question, the Board has already determined that the clause 10.15 (f) qualification does not operate to require Otis to restructure its work assignments of mechanics who are senior to those being laid off. As a corollary of that finding it can be said also that respondent counsel’s proposition that mechanics who are exercising their seniority to avoid lay off must be able to do all of the work remaining for mechanics has no merit. Notwithstanding, the responsibility in clause 2.02 of Otis to “. . . maintain the highest degree of operating efficiency. . .” and its right to assign work, to allow the proposition would be to make clause 10.15 (f) a nullity. For example, the proposition infers that the respondent has an unlimited right to lay off out of order of seniority any mechanics at the time of a lay-off who cannot perform all of the work that remains for all mechanics and effectively defeat their right to seniority protection on lay-off. (The Board hastens to add that there is no evidence in the instant situation that Otis has done so, even inadvertently). The right to assign work and the clause 2.02 responsibility cannot be applied in a manner that purposely or inadvertently circumvents clause 10.15 (f) rather it must be applied for valid business and operating reasons. This is not to say that Otis cannot rely on clause 10.15 (f) at the time of a lay-off to be able to retain junior mechanics to assure retention of a work force of mechanics which has the necessary skill and ability to do the work that remains. Quite the contrary, Otis has the right first to determine what work remains to be done in a global sense, and next, to determine what work force of mechanics must be retained so that it has a work force with the necessary skill and ability to perform the work as assigned by Otis to individual mechanics for valid business and operating reasons. In the first determination, the work that remains is the sum of the work to be done by all mechanics. In the second determination, the work that remains is the integral parts of the sum which are to be done by individual mechanics as assigned by Otis. When any of those assignments are to mechanics who were retained out of seniority order, they are subject to challenge by a senior mechanic who has been laid off. Therefore, *the work that remains* which he must have the necessary skill and ability to do is the work which has been assigned to the junior mechanic whose job he is claiming. Precisely what that work is would be subject to a finding of fact in the particular lay-off situation.

26. In respect of the second question, a firm consensus exists amongst arbitrators that management has the responsibility to determine which employee or employees amongst others has the requisite skill and ability under a seniority clause, but management’s assessment of the skill and ability component are subject to arbitral review. That consensus extends as

well to the standard of arbitral review to be applied to management's assessment, which is generally held to be whether it was reasonable, honest and unbiased in all the circumstances, including and subject to the terms of the collective agreement. While there have been many arbitration awards which have dealt with the scope of arbitral review and the standard to be applied to management's assessment of the skill and ability factor in promotions, lay-offs and recalls since the award in *Re U.E.W., Local 523, and Union Carbide Canada Ltd.* (1967), 18 L.A.C. 109 (Weiler), Prof. Weiler's statement at p. 117 remains a concise expression of the underlying rationale for the scope and standard of arbitral review:

"It should be noted that this does not mean (as the company appeared to advocate in its brief) that the employer's responsibility to decide on employee ability and qualifications is untrammelled and completely unreviewable. Rather, the company's decision must be non-discriminatory, *and subject to the terms of the contract* (including the seniority clause) in two senses: first, the judgment of the company must be honest, and unbiased, and not actuated by any malice or ill will directed at the particular employee, and second, the managerial decision must be reasonable, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling. *Yet the managerial discretion to decide has been limited by the terms of the agreement and it is the duty of the arbitration board to ensure that it is exercised in the light of proper principles and criteria*, that all relevant considerations have been adverted to, and that all in relevant factors have been excluded from the process of decision." [emphasis added]

In *Canadian Food and Allied Workers Union, Local 175 V. Great Atlantic and Pacific Company of Canada Limited*, 76 CLLC 14,056 (Div. Ct.) the court has made it clear that the standard to be applied includes ensuring that the employer has complied with the provisions in a collective agreement for the selection of employees for promotion (and in our view this would apply equally to lay-off and recall), wherein it stated at pp. 334-5:

"The board as a creature of the collective agreement must then see to it that the provisions of the collective agreement have been complied with; its role cannot be more or less than this. The honesty and the lack of *malafides* in making the decision are factors to be taken into account. So, too, is the question of whether or not the employer has acted unreasonably. Indeed, in determining the "reasonableness" of the employer's decision, the board may go a long way to determine the issue submitted to it. However, once the collective agreement makes provisions as to the method of selection of employees for promotions, then the board must see to it that those provisions have been complied with and in so doing, it cannot restrict itself in determining whether the employer acted honestly and reasonably. If the board is not to make such a decision, then the parties in the collective agreement should ensure that management's right in this regard is unfettered."

27. Thus management makes its decision on the ability factor and, if challenged, that

decision must stand the test against the standard referred to above. Accordingly, in this case, if the facts reveal that Otis has acted reasonably, honestly and free of bias and has properly applied the provisions of the Agreement, its decision should be undisturbed. Conversely, if its decision fails to satisfy that standard, the Board has the authority to substitute its decision for that of Otis. The onus of proof in challenges of this sort is with the applicant and in this respect see *Re Textile Workers Union and Lady Galt Towels Ltd.* (1969), 20 L.A.C. 382 (Christie).

28. Having regard to that onus of proof, the task remains to apply the standard outlined above to the facts in this case. The facts in respect of Wenzell are that Otis retained him out of order of seniority and assigned him to do the work of an adjustor as referred to herein. The facts dealing with the nature of adjusting work lead overwhelmingly to the conclusion that Otis selects mechanics for assignment to this work based on their all round ability in the elevator industry and, at least as they are used by Otis, they are a special skill group amongst mechanics. Wenzell was retained because he had the necessary skill and ability to do that work and the 16 mechanics who were laid off did not. There is no evidence to suggest that Otis acted unreasonably, dishonestly or with bias in its assessment of the skill and ability of Wenzell or the grievors and the facts are abundantly clear that none of the 16 mechanics who were laid off had the necessary skill and ability to do the work of a mechanic for which Wenzell had been retained. Therefore, none of the grievors are entitled to exercise their higher seniority to displace Wenzell. Crawford was retained as a mechanic to perform the contract service work on the CN Tower. As was the case with Wenzell, there was no evidence to suggest that Otis acted unreasonably, dishonestly or with bias in its assessment of the skill and ability of Crawford or the grievors, Price and Donegan who are senior to him. Again, the facts as set out herein reveal that these two grievors do not have the necessary skill and ability to do the work of a mechanic for which Crawford was retained and, therefore, they are not entitled to exercise their higher seniority to displace Crawford.

29. Price and Donegan both have greater seniority than Langan who was retained after they were laid off on November 2, 1979, until November 8, 1979. Except for the general argument that all 18 employees involved in the grievance were mechanics and therefore, the lay-off of the 16 mechanics should have been in strict order of seniority, no argument was advanced as to the entitlement of either Price or Donegan to have been retained instead of Langan. Having regard for that circumstance and in the absence of any evidence that Langan was retained for reasons inconsistent with a proper application of clause 10.15(f) by Otis or evidence that Price or Donegan had the necessary skill and ability to do the work of a mechanic for which Langan was retained, Price and Donegan are not entitled to exercise their higher seniority to displace Langan.

30. In the result, the Board concludes that Otis' conduct of the lay-off was proper and consistent with the provisions of the Agreement and its decisions in respect of the 18 mechanics should be undisturbed. The grievance in this referral is, therefore, dismissed.

0774-80-R James Wellwood, Applicant, v. Local 604-Hotel and Restaurant Employees and Bartenders Union, A.F. of L., C.I.O. C.L.C., Respondent, v. **Rock Haven Motels (Peterborough) Limited**, Intervener.

Practice and Procedure – Termination – Application filed more than one year following certification pursuant to section 7a – Union filing bargaining in bad faith complaint after receiving notice of termination application – Whether Board consolidating proceedings – Whether earlier section 7a findings affecting voluntariness of application.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members E.J. Brady and M.A. Ross.

APPEARANCES: *James D. Wellwood for the applicant; Raj Anand, Harry Lavoie and Gerry Ellis for the respondent; Gordon J. Weir for the intervener.*

DECISION OF THE BOARD; August 29, 1980

1. The name “Local 604 – Hotel and Restaurant Employees and Bartenders Union of the Hotel and Restaurant and Bartenders International Union A.F.L. C.I.O. C.L.C.” appearing in the style of cause of this application as the name of the respondent is amended to read: “Local 604 – Hotel and Restaurant Employees and Bartenders Union, A.F. of L., C.I.O. C.L.C.”

2. The respondent union was certified on June 13, 1979 (see [1979] OLRB Rep. June 559) pursuant to an exercise of the Board’s discretion under section 7a of the Act. The bargaining unit for which the respondent was certified was “all employees of the Rock Haven Motels (Peterborough) Limited in Peterborough, Ontario, regularly employed for more than twenty-four hours per week, save and except managers and those above the rank of manager.” Negotiation meetings were held on August 2nd, November 30th and January 14th at which latter time the union sought Conciliation Services. One meeting was held with a Conciliation Officer on March 18th and on March 26th a “no Board” report was issued, and the instant application was filed under section 49(1) of the Act on July 10, 1980.

3. On August 1, 1980 the respondent union instituted a section 79 complaint alleging that the intervening employer had contravened section 14 of the Act. At the hearing of the instant application, the respondent union moved to have the instant application consolidated with the section 79 complaint or alternatively to have the instant application adjourned until the section 79 complaint was adjudicated. The respondent argued that to proceed with the instant application would interfere or, perhaps, preclude the Board from providing an effective remedy if the Board found the section 79 allegations well-founded, and that the employer conduct leading to the section 7a application was cogent to whether in the instant case employees had acted “voluntarily” as would be the evidence which would be adduced in the section 79 complaint. The Board made an oral ruling that it did not consider it appropriate that the instant case be consolidated with the section 79 complaint or that it be postponed. The present situation is not unlike that of *North American Plastics Co. Ltd.*, [1969] OLRB Rep. Sept. 797 where the Board said at paragraph 5:

“While we recognize that there is a duty to bargain expressed in the Act, there are remedies available to parties if there has been a failure to

bargaining has taken place between the respondent and the intervener, however, an agreement was not reached and the employees have exercised their rights under the Act to engage in a lawful strike prior to this application being made. While the bargaining was between the company and the union and affected the employees, it can hardly be maintained that anything the employees did or did not do contributed to the circumstances which constitute the allegations of the union against the company. Why then should the employees, who otherwise would have an unfettered right within the time limits set out in the Act to bring an application under section 43 [now section 49], be prevented from doing so because of actions, improper or otherwise, of the union or the company? The Board's jurisdiction, once the application has been properly made, is to determine the number of employees in the bargaining unit at the time the application was made and whether fifty per cent of those employees have voluntarily signified in writing that they no longer wish to be represented by a trade union. If the Board is satisfied on those matters, then it must order that a representation vote be taken. We fail to see that there is a discretion given to the Board in this section of the Act to postpone an application or dismiss it for reasons other than those which would fall squarely within its determination of the prerequisites set out in that section for a vote to be held."

The Board in making its ruling also ruled that it would hear all relevant evidence bearing on the issue of the voluntariness of the employees' actions.

4. Mr. Jas Wellwood has been Head Maintenance Man at the Rock Haven Motel for some seven years and prior to that had worked in a similar capacity on a part-time basis. Mr. Wellwood has, from time to time, had working with him a helper or "assistant maintenance man." Mr. Wellwood regularly works from 7:00 a.m. to 4:00 p.m. and his job consists of setting up rooms, mopping, dusting, taking care of garbage, making physical repairs, etc. He receives his work assignments by a list from the proprietor or from the Front Desk.

5. Mr. Wellwood states that following the taking of a strike vote he was approached by a number of employees who asked if there was any way to "dispose of the union." Mr. Wellwood undertook to see what he could do and the other employees undertook to give him as "much backing as possible". Mr. Wellwood investigated the matter including speaking with another representative, and learned that it was necessary to wait for one year from the certification and that Mr. Wellwood would have to be a member of the bargaining unit.

6. Mr. Wellwood states he went to the Motel's time-card rack and made a list of names of all employees which he then used in making his contacts. He states he had forty-one names on his list and secured thirty-nine signatures. The preamble of a petition was composed by Wellwood, and his daughter corrected the spelling and typed it out for him.

7. Mr. Wellwood secured signatures over a period of four days. While one or two signatures were secured at employees' homes, in the main the signatures were secured in the parking lot prior to the start of after the completion of employees' shifts. Because employees have staggered starting and quitting times, Wellwood, who was aware of their shifts, would absent himself from the premises at the times he expected to be able to meet them. Some twenty of the

signatures were secured during what would be Wellwood's normal hours of work. In all cases Wellwood states he would ask the employee to read the printing at the top and tell them "if you wish, sign it. If not, it's your own discretion. You don't have to sign."

8. Mr. Wellwood states that it is not unusual for him to be absent from the premises for short periods for business reasons and he would tell the Front Desk that he would be absent. He states he notified no one in respect to his absences while securing signatures. When asked why he had not notified anyone, his response was, "I didn't think anyone should know. Next thing you know, management will see it. I don't believe stuff like this management should know-same as signing up for the union." He also states that his job was such that he was expected to complete his daily assignments and that any time he took off, he had to make up.

9. Mr. Wellwood states he was told by Shirley Grant and Diane Rogers, stewards who sat in on the bargaining, that there were forty-one persons in the bargaining unit. (It was testified by Mr. Laroce, President of the respondent, that the two individuals were not "stewards" inasmuch as there was no collective agreement, but that they both sat in on bargaining and that one had given evidence at the certification hearing.) It was from these persons that Wellwood states he received the description of the bargaining unit, and when confronted with the use of words "save and except", he stated he has sat at bargaining tables and has contracts. When asked whether he had copied the name of the respondent from some documents, he replied, "I was told to read it - saw it in the local paper as well", and that he had asked Shirley Grant for the address and she gave it to him. Mr. Wellwood was asked if he was aware that Grant and Rogers were not stewards, he replied, "Shirley Grant said not any more."

10. The respondent acknowledges that there is no direct evidence of employer involvement in the origination or circulation of the petition, but points to a number of circumstances which, he argues, cumulatively should cause the Board to draw an inference to tacit employer approval. The respondent points to the fact that signatures were obtained outside the work premises but close enough that they could have been physically observed, that Wellwood left the premises a number of times during regular work hours to secure signatures and must have had employer approval or created such impression amongst employees, that the use of the full legal name of the respondent and the precise wording of the bargaining unit as set out in the Board's certificate is indicative of access to official documents through the employer. The respondent urges the Board to consider the findings of fact relating to contraventions of the Act in the certification application, together with evidence given in the instant application relative to bargaining progress and to conclude that the employer's course of conduct throughout has continued to make evident to employees an inflexible opposition to recognizing the union such as to make it impossible for any signification of wishes of employees to be voluntary.

11. The respondent established in evidence that in direct bargaining, the major issues were union security, welfare and wages, and that the employer's position was that wages could not be settled prior to a settlement on union security and that a section 7a certificate did not form a sound basis for the employer to move on union security. That condition existed in June, 1980 when Bill 89 of the Legislature became effective which the respondent felt removed the union security stumbling block and caused the respondent to get back in touch with the Conciliation Officer. The employer's position as conveyed through the Conciliation Officer, and directly to the respondent by the employer, was that there was little sense in a meeting in the face of the instant application.

12. The issue before us is whether the employees have voluntarily signified in writing

that they no longer wish to be represented by the respondent trade union. We conclude that, in viewing the origination and circulation of the petition by itself, the evidence established it to be totally free of employer involvement. The evidence does not justify an inference that Wellwood's short absences from work, in the total circumstances, would be viewed by employees as authorized by the employer. Similarly, there being no evidence of an employer presence during the times of signature gathering makes the suggestion that physical distances could have been such that had the employer been present, he could have observed without merit. Also, we think the facts relating to the language used to describe the bargaining unit and the legal designation of the respondent point to Shirley Grant, a one-time union representative, as the source rather than the employer. Mr. Wellwood testified that at no time did he discuss the petition in any way with the employer, and the evidence does not support an inference that the employer had knowledge of the petition or that employees would have thought he had such knowledge.

13. Viewing the origination and circulation of the petition as a discrete activity, we would conclude it to have been voluntary. Before leaving the matter there, however, the respondent raises the issue that the general atmosphere arising from the previous contraventions of the Act, and the employer subsequent course of conduct in bargaining in themselves would preclude a likelihood that the petition represents the voluntary wishes of the employees.

14. The contraventions of the Act dealt with by the Board in its June 13, 1979 decision, all occurred in February, 1979 prior to the filing of the application for certification. No evidence was adduced in the instant application of any employer communication subsequent to February, 1979 to employees or any further employer activity such as would found an inference that the intimidating or coercive atmosphere of February, 1979 was revived or kept alive so as to be a continuing fact in the minds of employees. The respondent's argument can only be that employees were aware that the collective bargaining negotiations were not being fruitful: there was no evidence that the employer had utilized the progress in negotiations as a basis for communicating with employees in any fashion as a means of reaffirming its actions of February, 1979. Under all the circumstances, with this application being some sixteen months distant from the complained of acts of February, 1979, and with no further similar activity by the employer, we must conclude that the atmosphere initially created has been dissipated. Obviously, we express no opinion in respect to the separate current proceeding in which the respondent alleges the employer has contravened section 14 of the Act. Whatever may be the outcome of that matter, the respondent has failed to establish in the instant application that the minds of employees have been so affected, thereby, that they are unlikely to be able to voluntarily express their wishes in respect to continued representation.

15. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of Rock Have Motels (Peterborough) Limited in the bargaining unit, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of July 25, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the Act.

16. The Board directs that a representation vote be taken of the employees of Rock Haven Motels (Peterborough) Limited. Those eligible to vote are all employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employ-

ment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with the intervener.

18. The matter is referred to the Registrar.

0753-80-U Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Superior Oil Company**, and Liquiflame Oils, A Division of Ultramar Canada Inc., Respondent.

Lock-Out – Reduction in available work – Employees facing lay-off – Offered alternative employment – Whether lock-out (Inadvertently omitted from July report)

BEFORE: R.A. Furness, Vice-Chairman.

APPEARANCES: *Ken Petryshen, Susan Stewart and Jack Hurd for the applicant; S.C. Bernardo, F.N. Scott and Bob Campbell for the respondent.*

DECISION OF THE BOARD; July 28, 1980

1. The applicant has applied for relief under section 83 of *The Labour Relations Act* and has requested the Board to direct the respondents to return all employees of Superior Oil Company ("Superior") to their former positions and to fully compensate these employees for their loss. The applicant has also requested the Board to direct the respondents to cease and desist from further violations of this nature.

2. The applicant alleged that the unlawful lock-out commenced on July 7, 1980, and was continuing at the time of the hearing on July 15, 1980. The respondents denied that they had unlawfully locked out any employees.

3. The applicant, on the one hand, and Toronto Fuels Company, Liquiflame Oils, Halliday Fuels, Shully-Dibble Fuels and Superior, on the other hand, are bound by a collective agreement which continues in effect until September 30, 1980. Toronto Fuels Company, Liquiflame Oils and Halliday Fuels are operating trade styles of the Toronto Retail Group of Ultramar Canada Inc. ("Ultramar"). These three operating trade styles were divisions and are now merged into one operating group. Superior is an operating division but had a separate seniority list from the seniority list of Toronto Fuels Company, Liquiflame Oils and Halliday Fuels. However, these three operating styles and Superior now have a common seniority list and, operationally speaking, are now merged. After the merger Superior became a division of Ultramar. Officially, all the employees are employees of Ultramar. In essence, the one oper-

ating division has four marketing names. The employees in all four marketing names receive their cheques from Liquiflame Oils. With respect to pension benefits all are employees of Ultramar.

4. Comfort Guard Services ("Comfort") is an entity which consists of brokers who provide oil burner servicing. The Toronto Retail Group, which was formerly comprised of Toronto Fuels Company, Liquiflame Oils and Halliday Fuels, had their oil burner service work performed by Comfort, which is a division of Ultramar, and is not in the business of delivering fuel oil. The Board issued a certificate to the Fuel Oil & Natural Gas Service Technicians Associations with respect to certain employees of Comfort and a collective agreement was signed on February 28, 1979. The employees of Comfort are paid by Comfort cheques. Comfort and Liquiflame Oils are located in the same building.

5. Formerly Superior delivered fuel oil and provide oil burner servicing. Prior to the merger on July 2, 1980, Superior had a very small division with a seasonal maximum of five fuel oil drivers, four servicemen and one mechanic. Liquiflame Oils has indicated that it intended to move Superior into the operational unit which existed in Toronto. This involved moving Superior in with Toronto Fuels Company, Liquiflame Oils and Halliday Fuels. The employees doing the oil burner servicing work for Superior were notified that they were being laid off in June and their effective layoff began on July 7, 1980. In the period February – March two fuel oil drivers were laid off. In May there were two more drivers about to be laid off but they had greater seniority than two servicemen and the ultimate effect was that there are two drivers who are doing service work and two servicemen who were laid off by virtue of bumping. The four remaining employees who were doing service work were laid off on July 7, 1980. Up until July 7, 1980, there were five people doing the service work. The two servicemen who were laid off in May would normally have been recalled to replace any one of the five who were taking vacations. Once the weather becomes cold the two drivers would in all probability revert to delivering fuel oil and the two servicemen who had been laid off in May would be called back to do the servicing work. Since July 7, 1980, the servicing work is being done by employees of Comfort.

6. The applicant's position is that the layoff of the five employees of Superior who were doing the cleaning of burners until July 7, 1980, constitutes an unlawful lock-out. The applicant has represented the eight employees affected by this application since certification some ten years ago. Jack Hurd, the secretary-treasurer and business agent of the applicant, testified that he was first made aware of changes taking place by a letter dated March 28, 1980 from Frederick Scott, the president of Liquiflame Oils. This letter states:

"Dear Mr. Hurd:

In our contract with you we are serving about 24,000 customers in Superior Oil and the other unionized companies. Because of an adverse market this could shrink by 2 to 3 thousand customers per year significantly effecting the jobs of our employees.

In order to preserve a viable presence in the market place, we believe that, it is desirable to combine our interests in Toronto into one unit. There are two points in doing this that require some accommodation between the company and the union.

The first point concerns the servicemen at Superior Oil whom we would propose to transfer to Comfort Guard Services and give them employment with the dependent contractors association that looks after the bulk of our service. We believe that this proposal would well serve the interests of Superior Oil's service personnel and in fact give them year round employment which they all do not have with the present arrangement.

The second point relates to 4 brokers that are presently with Automatic Fuels.

We believe that we have an obligation to continue to provide employment for these "brokers". We are attaching a map of Metro indicating the areas we would suggest for this operation. We would also be prepared to make a commitment to the effect that no new "brokers" would be hired. When the existing "brokers" dissociate themselves the territories outlined in the attached map would be served by union employees.

The consequences of implementing this proposal would be to increase the number of accounts serviced by our employees from 24,000 to about 30,000 and reduce the geographic area that they cover thus enabling them to become more productive and presumably increase incentive earnings.

Since varying amounts of lead time would be required to accomplish this program an early indication of your opinion on this proposal would be appreciated.

Yours truly,

'F.N. Scott'
President"

7. Meetings were held subsequent to this letter among Mr. Hurd, Mr. Scott, other representatives of the respondents and employees who were effected by the changes which Superior proposed to introduce. The effect of the change would mean that these employees would cease to be covered by the collective agreement with the applicant and would instead be covered by the collective agreement with the Fuel Oil & Natural Gas Service Technicians Association. These employees had studied the last mentioned collective agreement and informed Mr. Hurd that they did not want to become dependent contractors. These employees are of Italian descent and fluently speak Italian. Mr. Hurd had no doubt that the respondents wanted these employees to service the large Italian business that Superior served. These meetings did not resolve the impasse in the positions of the parties. The applicant wanted to preserve the *status quo* while the respondents wanted to implement changes in their system of operating their businesses.

8. On June 23, 1980, Mr. Hurd received the following letter from Mr. R.H. Campbell, the general manager of Liquiflame Oils:

"Dear Mr. Hurd:

Effective July 2, 1980 Superior Oil Company is to be merged with the

combined Toronto Fuels, Liquiflame Oils and Halliday Fuels operations. In compliance with clause 11.11 of the collective agreement between Toronto Fuels, Liquiflame Oil and Halliday Fuels and Fuel, bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352 we propose to combine the union seniority lists of Superior Oil and Toronto Fuels, Liquiflame Oils and Halliday Fuels. Employees of the merged operations will be credited with their same seniority dates as previously held with their respective employers.

Since Liquiflame Oils, Toronto Fuels and Halliday Fuels have historically had their burner repair services done by Comfort Guard Services we propose to merge the Superior Oil serviceman's seniority list with the Liquiflame Oils, Halliday Fuels and Toronto Fuels Drivers Group Seniority List. We will then endeavour to train the Superior Oil servicemen as drivers so that they may continue as salaried employees. Pursuant to clause 9.10 the servicemen would be paid at the servicemen's rates for a period of two months after which the rates of pay would change to driver rates as specified in the collective bargaining agreement.

In the event that the Superior Oil servicemen do not accept the job classification transfers we are prepared to offer them positions as dependent contractors in our Comfort Guard Services burner service department. In this case it is to be understood that they would have to abide by the collective bargaining agreement between Comfort Guard Services and Fuel Oil and Natural Gas Service Technicians Association.

We will be happy to arrange interviews for the servicemen who so desire to exercise this option.

Yours very truly,

'R.H. Campbell'
General Manager"

It was the opinion of Mr. Hurd that the respondents were applying pressure to the employees who are affected by this application to force them by means of a layoff to become dependent contractors.

9. In cross-examination Mr. Hurd agreed that article 11.11 of the collective agreement with the applicant had one seniority list and that bumping could occur if an employee had the requisite qualifications and licences. Mr. Hurd agreed that the applicant has agreed to the respondents' proposal to retain four drivers who are "brokers" and who will be working outside Metropolitan Toronto.

10. Frederick Scott, a vice-president of the Ontario Division of Ultramar, testified that there were several divisions of Ultramar and that some of them operate together and some of them operate quite separately. Some of these companies have separate seniority lists. The witness referred to one such company by the name of Automatic Fuels and stated that it is a non-union company which was operating with its own office in Downsview. Deliveries of fuel oil for Automatic Fuels were performed by a combination of two salaried drivers and eight

owner-operators who own their delivery trucks. Mr. Scott also informed the Board that there was also a division called Higrade Fuels which is also non-union and has its own office in Toronto with approximately six drivers in its employ. He gave evidence that in September of last year the Ultramar group reviewed the economies of their business and discovered that they were losing ten per cent of their business each year to natural gas. It was decided that in order to survive the companies would have to merge into one unit and offices would have to be consolidated under one roof. Similar consolidations in operations have also involved an operation entity called Quality Fuels. In general terms, Ultramar has been attempting to reduce its overhead expenses by consolidating its various offices and operations.

11. Mr. Scott testified that there are eight brokers with Automatic Fuels and that Ultramar decided to give its attention to four of them because it did not think that the applicant would assent to having all eight of them treated in the proposed manner. In these circumstances, Mr. Scott elected to look after the four brokers to whom he thought there was the greatest obligation in terms of minimizing the effect of the economic impact. The arrangement which had been tentatively agreed to by the applicant would have approved the four brokers being retained and as they retired their areas of work would revert to the applicant's jurisdiction. In addition, with respect to the seniority of the drivers of Higrade Fuels, it was agreed with the applicant that they would have to go to the bottom of the overall seniority list and upon recall would have to become members of the applicant. The witness denied that anyone was being forced to become dependent contractors and expressed the view that Ultramar thought it was the best way for all concerned. He testified that he expressed these views to Mr. Hurd and the employees who are effected and explained that it was a good solution to a problem which Ultramar faced, namely, a steadily shrinking market.

12. When the employees who are effected by this application did not accept the employment offered to them with Comfort, the respondents laid them off. When such employees are placed in dovetail seniority they had enough seniority to take work in the Toronto Retail Group. When they were laid off they did not have enough seniority to bump employees who were driving on July 7, 1980. Mr. Scott testified that the employees who are effected by this application would be recalled and that such recalls, depending upon the weather, will generally commence after Labour Day through to December. It was his testimony that these employees were laid off because Ultramar had no work for them in the newly merged scheme of operations. In this new scheme Comfort would do all the service work.

13. There are eight employees who are effected by this application. There is no doubt that if the respondents' conduct amounts to a lock-out such a lock-out would be unlawful having regard to the fact that it occurred during the term of a collective agreement. The definition of lock-out in section 1(1)(i) of the Act states:

“‘lock-out’ includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;”

14. This definition of lock-out contains two elements. Firstly, the physical act of the

closing of a place of employment or suspension of work or a refusal to continue to employ a number of employees. Secondly, the motive or purpose for such acts. In order for a lock-out to have occurred, it is necessary to show not only the physical act but also that the motive or purpose was to compel or induce the respondents' employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the trade union or the employees. See the *Humpty Dumpty Foods Limited* case, [1977] OLRB Rep. July 401; and the *Canada Valve Limited* case, [1979] OLRB Rep. August 731.

15. It is quite clear that Mr. Hurd and Mr. Scott have enjoyed a good relationship over the years and Mr. Hurd testified that Mr. Scott would not hide anything from him. The evidence, which was uncontradicted, established that Ultramar is engaged in an industry which is experiencing relentless competition from natural gas. It is clear that Ultramar was convinced that in order to survive as a viable and profitable undertaking it had to reduce its overhead expenses and streamline its operations. To this end offices were closed and consolidated and various operating entities were merged. The effect of this was in some ways to be beneficial to the applicant with respect to the extent of future representational rights among employees of Ultramar. However, as part of the reorganization, some eight employees were to be required to work under different conditions of employment. Mr. Scott impressed the Board as a compassionate man who was trying to preserve as many jobs as possible while he still had the power to make decisions.

16. On the evidence before it, the Board is satisfied that the respondents' decisions with respect to the eight employees who are affected by this application was related to considerations of a commercial nature and were not designed to compel or induce them to refrain from exercising rights or privileges under the Act or to agree to an alteration in their terms or conditions of employment.

17. The Board accordingly finds that the respondents' actions with respect to laying off the eight employees who declined to become dependent contractors did not constitute a lock-out within the meaning of section 1(1)(i) of the Act. This application is dismissed.

2029-79-U Hotel and Club Employees' Union, Local 299 Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.I.C.-C.L.C.), Complainant, v. Sutton Place Hotel and Dennis Commercial Properties, Respondents.

Damages – Mitigation of loss of earnings – Whether grievor's job search adequate – Board calculating damages including interest and loss of vacation entitlement

BEFORE: R. D. Howe, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: Alick Ryder, Q.C., and Marilyn Nairn for the complainant; P. M. Rusak and Agilmar Lenz for the respondents.

DECISION OF THE BOARD; August 21, 1980

1. In a majority decision dated March 26, 1980 concerning this section 79 complaint, the Board found that "the company violated section 58 of the Act when it terminated [Mr. Gordon Garland's] employment" on January 8, 1980 and directed "that Mr. Garland be reinstated into his employment with Dennis [Commercial Properties] forthwith and that he be compensated for his lost wages resulting from his unlawful termination", with the compensation bearing interest in the manner described in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35. The Board remained seized in the event the parties were unable to agree on the amount of compensation owed to Mr. Garland.

2. Since the parties were unable to agree on the amount of compensation owed to Mr. Garland (the "grievor"), a hearing was held on July 31, 1980 at the request of the complainant to determine the amount of compensation owed to the grievor.

3. Counsel for the complainant contended that the grievor was entitled to compensation in the amount of \$2,503.30. Counsel for the respondent, on the other hand, contended that the grievor had failed to mitigate his loss during the period from the date of his discharge (January 8, 1980) to April 1, 1980, the date the aforementioned decision of the Board was received by Dennis Commercial Properties (the "Company"). Thus, she contended that the grievor was not entitled to any compensation from the Company for that period, although she conceded that the Company was liable for compensation from April 1, 1980 to April 28, 1980, the date on which the grievor was reinstated, subject to deduction of any sum which the grievor may have earned between those dates.

4. The grievor testified concerning his efforts to obtain alternate employment. Although counsel for the Company questioned the grievor's credibility, the Board, having regard to such factors as the consistency of his evidence, the firmness of his memory, his ability to resist the influence of interest to modify his recollections, his capacity to express his recollections clearly, and his demeanour, is of the view that the grievor was a highly credible witness who testified in a candid and forthright manner.

5. The grievor has both a bachelor's degree and a master's degree in geography with emphasis on urban geography and urban regional planning. After obtaining his bachelor's degree from the University of Western Ontario, he was employed first by the Ministry of

Housing and then by the Ontario Housing Corporation until he enrolled in a master's degree programme at the University of Toronto. Upon graduation in December of 1978, he sought professional employment commensurate with his educational qualifications but was unable to obtain such employment due to "tight hiring" and a slowdown in the economy. After several months of unsuccessfully searching for professional employment, the grievor decided to seek a position in which he could use his trade skills as a painter. By checking the Canada Manpower call board he became aware of, applied for, and obtained a position with the Company as a painter commencing on June 15, 1979. It was from this position that he was discharged on January 8, 1980.

6. After his discharge, which came as a severe shock to him, the grievor spent some time attempting to "regroup" himself and to initiate and prepare for legal proceedings to obtain reinstatement. He also began to check two Toronto newspapers on a daily basis for urban planning ("professional") and painting ("trade") positions. Beginning on January 11, 1980, he typed and mailed at least 21 letters to prospective employers in the urban planning field, many of which were followed up by telephone calls and personal interviews. On January 17, 1980, he registered at the Toronto Canada Manpower Centre as an unemployed painter and attended at that Manpower office at least once a month to check the call boards for professional and trade positions. As a result of his efforts, the grievor obtained short-term professional employment in late February with Clayton Research Associates. He also subsequently found work as a helper installing drywall on a building which was being renovated.

7. No evidence was adduced by the Company to refute the grievor's testimony that no trade position was available during the time period in question due to the state of the economy combined with the normal seasonal fluctuations in the painting trade which result in a dearth of painting jobs during the winter season.

8. The grievor stated quite candidly that he spent about 85 per cent of his job search time pursuing a professional position and only about 15 per cent in pursuit of a trade position. Although counsel for the Company vigorously argued that this statement proved that the grievor had not made a reasonable effort to mitigate his loss by attempting to obtain alternate employment as a painter, there is nothing to suggest that the grievor would have been any more successful in mitigating his loss if he had spent more time pursuing a trade position and less time in pursuit of professional employment. Although counsel contended that the grievor should have checked the Canada Manpower call boards more frequently than he did, in the absence of any evidence that painting jobs were available during the period, there is nothing to refute the grievor's contention that this would have been a waste of his time. Moreover, the grievor's testimony, based upon his past experience, that Canada Manpower contacts registrants in the event that it has an order for jobs which they are capable of performing, was also not refuted.

9. A person who has been discharged has a duty to take reasonable steps to mitigate his loss by seeking alternate employment (see *Ernie's Signs Limited*, [1976] OLRB Rep. Aug. 404; *Lyman Tube Division, Jannock Industries Limited*, [1974] OLRB Rep. July 456; and *Murray Bros. Lumber Co. Ltd.*, [1969] OLRB Rep. Feb. 1194). Where a grievor makes no real effort to obtain alternate employment or otherwise mitigate his loss, he will not be entitled to any compensation for loss of wages (see *Cords Canada Ltd.*, [1973] OLRB Rep. Aug. 429 and *Little Bros. (Weston) Limited*, [1975] OLRB Rep. Jan. 83).

10. The burden of proof that the grievor has failed to take reasonable steps to mitigate his loss falls upon the respondent, as indicated by the Supreme Court of Canada in *Red Deer College v. Michaels and Finn*, 75 CLLC ¶14,280 at pages 581 and 582:

“... The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. The reference in the case law to a ‘duty’ to mitigate should be understood in this sense.

In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he had taken reasonable steps to avoid their unreasonable accumulation....

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant’s position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial Judge’s assessment of the plaintiff’s evidence on avoidable consequences....”

11. A statement of the Board’s general practice concerning mitigation is contained in the *Ontario Society For the Prevention of Cruelty to Animals (Ontario Humane Society)*, [1973] OLRB Rep. Sept. 474, at page 476:

“It has been the Board’s practice that registration with the Department of Manpower and a Claim for Unemployment Insurance which are usually made simultaneously are reasonable steps taken by a discharged employee to mitigate his loss.”

A personal canvass for alternative employment has also been viewed by the Board as being important to the issue of mitigation (see *Little Bros. (Weston) Limited*, *supra*, and *DeCarlo Shoe Co.*, [1965] OLRB Rep. June 224).

12. In the *Ontario Humane Society* case, *supra*, the grievor waited “approximately a week or ten days before registering with Manpower and was not able to give the Board the date when he did register. In the circumstances of that case, the Board found that the grievor did not take proper steps to mitigate his damages during that period; accordingly, the Board denied the grievor compensation for the period in question. Counsel for the respondent argued on the basis of that case that the grievor in the present case should be denied compensation from the date of his discharge (January 8, 1980) to date on which he registered with Canada Manpower (January 17, 1980).

13. The Board had held that the failure to register with Canada Manpower is not determinative of the issue of mitigation (see *Offset Make Up Limited*, [1969] OLRB Rep. Dec. 1152). Whether or not a grievor has taken reasonable steps to attempt to mitigate his loss is a question of fact dependent upon the particular circumstances of each case (see *Murray Bros. Lumber Co. Ltd.*, *supra*, at paragraph 11). Although the grievor could have registered more promptly with Canada Manpower, we are not prepared to find in the circumstances in the present case that his failure to do so constituted a failure to take reasonable steps to mitigate his loss, since the grievor was taking other reasonable steps during that period to attempt to obtain alternate employment as indicated in paragraph 6 of this decision.

14. While the grievor might have been found to have acted unreasonably had he sought only employment in his profession and not in his trade, the Board is of the view that it is reasonable for a person such as the grievor who is qualified not only for a trade position as a painter but also for a professional position as an urban planner, to take steps to attempt to obtain professional employment in addition to taking steps to attempt to obtain trade employment. The reasonableness of the grievor's actions is confirmed by the fact that he succeeded in procuring professional employment, albeit on a short-term basis, the earnings from which must be taken into account in reducing the compensation for which the respondent is liable. The *Offset Make Up Limited* case, *supra*, cited by counsel for the Company, is authority for the proposition that a grievor with craft (such as the "paste-up man" in that case) acts reasonably in holding out for a job in his craft and not attempting to find employment outside his craft during a short term of unemployment (less than one and one-half months in that case). However, it is not authority for the proposition that a person acts unreasonably if he exceeds the normal mitigation requirement by attempting to find employment not only inside but also outside his craft, nor is it authority for the proposition that a person who has more than one "craft" acts unreasonably if he attempts to locate employment not only inside the craft at which he was working at the time of his discharge but also within his other craft.

15. As submitted by counsel for the complainant, the fact that the grievor did more in his efforts to obtain a professional position than was necessary to satisfy the requirement of a reasonable mitigation effort, does not necessarily indicate that he did not take reasonable steps to attempt to obtain employment in his trade as a painter.

16. Having regard to all the evidence and the submissions of the parties, the Board finds that the grievor took reasonable steps to attempt to mitigate his loss in the circumstances of this case.

17. The evidence establishes that the grievor would have received \$2,920.00 in wages from the respondent between his date of termination and his date of reinstatement. From this amount must be deducted \$533.00 which the grievor earned from other employment during that period. Although it was contended on behalf of the respondent that a further deduction of at least \$40.00 should be made because the grievor was unable to work due to illness on at least one day during that period, it appears on the evidence before us that if the grievor had not been terminated by the respondent, he would have received a sick leave credit of one and one quarter days per month. Thus, it has not been proved that this further requested deduction would be appropriate in the circumstances of the present case. The respondent is also liable for interest in the amount of \$98.44 on the grievor's wage loss of \$2,386.50 in accordance with the interest calculation set forth in *Hallowell House Limited*, *supra*.

18. Counsel for the complainant also claimed that the grievor was entitled to vacation credits of five days, being the vacation credits which would have accrued to the grievor if he had not been unlawfully terminated. Counsel for the respondent opposed this claim. After noting that the Board, in paragraph 18 of its majority decision dated March 26, 1980, directed that the grievor "be compensated for his lost wages resulting from his unlawful termination", counsel argued that vacation credits were not encompassed by the term "wages".

19. The purpose of a remedial order under section 79 is to put the grievor who has been wronged in as good a position as he would have been in if the respondent had not violated the Act. If the grievor had not been discharged but rather had been permitted to continue working to earn the aforementioned wages, he would have accumulated five days' vacation credits. Accordingly, the Board finds that the grievor is entitled to vacation credits of five days.

20. The Board, therefore, directs the respondent Dennis Commercial Properties, to pay the sum of \$2,484.94 and provide vacation credits of five days to Mr. Gordon Garland in compensation for his unlawful termination.

0404-80-U United Food & Commercial Workers International Union, Local Union 175, Complainant v. Valdi Inc. (trading as Valdi Discount Foods), Respondent.

Arbitration – Discharge for Union Activity – Practice and Procedure – Whether Board deferring to arbitration under agreement – Grievor probationary employee – Whether probationary status affecting policy of deferral – Board deferral policy reviewed – Union steward discharged for engaging in union activity – Violation established – Board policy on remedies including posting of notices

BEFORE: George W. Adams, Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Douglas J. Wray and Frank G. Kelly for the complainant; and B. W. Adams, E. Dragan, and K. Walker for the respondent.*

DECISION OF GEORGE W. ADAMS AND W. F. RUTHERFORD; August 25, 1980

1. This is a complaint filed by the United Food & Commercial Workers International Union, Local 175 (hereinafter referred to as "Local 175") against Valdi Inc. (trading as Valdi Discount Foods and hereinafter referred to as "the employer") on behalf of the grievor, Valerie Henry. The complaint had also been brought on behalf of a Carol Etserig but was amended at the outset of the hearing to delete her name.

2. The complaint alleges that the grievor, an employee of the respondent, was dismissed in the course of her duties as union steward and because she was carrying out her proper role in this respect, contrary to the provisions of *The Labour Relations Act*. At the time of her dismissal a collective agreement was in effect between the employer and Local 175 and,

therefore, an initial question pertained as to whether this Board should apply its policy of deferral to grievance arbitration. The panel ruled at the outset of the hearing that it would not defer and our reasons for so ruling will follow a recitation of the facts material to this preliminary issue.

3. Over the previous year Local 175 brought three successful applications for certification in respect of part-time employees affecting stores of the employer located in Metropolitan Toronto, St. Catharines and Hamilton, Ontario. Following the issuance of certificates in these applications, the employer and Local 175 entered into collective bargaining. Bargaining culminated, on February 11, 1980, with a collective agreement recognizing Local 175 as the sole and exclusive bargaining agency for all employees of the employer in its retail food stores in the Province of Ontario regularly employed for not more than twenty-four hours per week and students employed in off-school hours and during school vacation periods. Province-wide recognition is not the usual hallmark of an employer bent on violating the collective bargaining rights of employees. However, the dismissal of the grievor on April 14, 1980 occurred within a few months of the execution of this first collective agreement between the parties and is alleged by Local 175 to have been based on the grievor's conduct as a union steward. Moreover, there is no dispute between the parties that the grievor had not served out the probationary employee period provided for under the collective agreement at the time of her dismissal. It was, therefore, the combination of these factors that caused us to hear the complaint and not to defer to grievance arbitration. The importance of this decision in the light of the Board's previous policy on deferral to arbitration requires some greater explanation.

DEFERRAL TO ARBITRATION

4. The issue of whether or not the Board should defer to grievance arbitration arises when an alternative remedy exists under a collective agreement which is available to the grievor or complainant. Although the complainant has chosen to seek its remedy before the Ontario Labour Relations Board, the Board has a discretion under section 79 to refuse to inquire into a complaint and the existence of an equivalent remedy under a collective agreement has, in the past, been a basis on which the Board's discretion has been exercised. In other words, the Board is not obligated to inquire into every complaint brought under section 79 and its refusal to so inquire cannot, therefore, be characterized as an improper refusal to exercise its jurisdiction. See *Regina v. Ontario Labour Relations Board ex parte T.R.W. Electric Components Ltd.* (1969), 9 D.L.R. (3d) 669. On the other hand, it is the Ontario Labour Relations Board that is charged with the responsibility for administering *The Labour Relations Act* and the important rights it confers on employers and employees. This responsibility is a public duty and a policy of deferral to a more private process where the adjudicators are paid and selected by the parties to a collective bargaining agreement must find its justification within the four corners of *The Labour Relations Act* to be consistent with that public interest. To many, this justification is not readily apparent. See Bilkin, *Are Arbitrators Qualified to Decide Unfair Labor Practice Cases?* (1973), 24 Lab. L. J. 818; Simon-Rose, *Deferral Under Collyer by the NLRB of Section 8(a)(3) Cases* (1976), 27 Lab. L. J. 201; Newman, *NLRB Deferral to Arbitration in Unfair Labor Practices* (1973), 26 N.Y.U. Conf. on Lab. 37; and Comment, *Deferral to Labor Arbitration* (1975), 27 Hastings L. J. 403. Why, it can be asked, should the Board ever defer to a private arbitration where a question concerning the application of *The Labour Relations Act* arises? Arbitrators are expert on the language of collective agreements and do not, as a group, have the expertise in labour board

statutory issues that the Board has necessarily acquired through a long, intimate and specialized experience with its statute. The involvement of arbitrators in statutory issues may well result in a lack of uniformity over the meaning of important provisions of *The Labour Relations Act* or encourage direct judicial construction of an extrinsic statute on an application for judicial review. See *McLeod v. Egan*, [1975] 1 S.C.R. 517. In contrast, the Ontario Labour Relations Board is an ongoing administrative agency whose jurisdiction is provided for in the context of a privative clause. It, therefore, is able to achieve a uniform interpretation of the statutory provisions it considers. Indeed, the Board's experience in such matters provides the very justification for the statute's privative clause. There is also the possibility that the deferral of tough statutory questions to grievance arbitration will encourage lengthy, costly, complicated and legalistic hearings in that forum. This result would undermine the very features of grievance arbitration that underlie the policy of *The Labour Relations Act* requiring its insertion in every collective bargaining agreement. In fact, today, in contrast to Ontario Labour Relations Board proceedings, there is considerable doubt that grievance arbitration is sufficiently expeditious and inexpensive. Finally, there may be important procedural and remedial differences between the Ontario Labour Relations Board and grievance arbitration in any particular case and, where this may be the case, a deferral to grievance arbitration could deprive a complainant of important statutory rights. For example, if a matter did not involve discipline or discharge, a complainant would not have the benefit in grievance arbitration of the reverse legal onus provided for under section 79 of *The Labour Relations Act* nor would he have access to the Board's expansive remedial powers provided for by this same section. Surely these factors are relevant to any decision by this Board to defer to another forum. And, it is against these considerations that some might ask the more fundamental question of what business does the Ontario Labour Relations Board have in the "subcontracting" of any public authority to private tribunals?

5. The answer to this question depends upon the fact that the statute creating the Labour Relations Board is the same statute that requires grievance arbitration of all disputes over the interpretation, application and administration of a collective agreement. On a review of *The Labour Relations Act*, it is difficult to conclude that grievance arbitration is simply a private process and that it is any less important than the Ontario Labour Relations Board in fostering industrial peace and facilitating co-operation between employees and employers. See Weiler, *Reconcilable Differences, New Directions in Canadian Labour Law*, (1980), chapter 3. Viewed in this light, a policy aimed at integrating their responsibilities and dealing with concurrent jurisdiction problems is not as troublesome as it is in those situations where grievance arbitration shoulders a responsibility under a different or extrinsic statute. For example, in the latter situation the United States Supreme Court has said there should be a trial *de novo* under Title VII of the *Civil Rights Act of 1964* even though the precise issue of racial discrimination has been submitted to final and binding grievance arbitration. See *Alexander v. Gardiner-Denver* (1974), 415 U.S. 36. But see also the NLRB's distinction in *Electronic Reproduction Service Corp.* (1974), 87 LRRM 1211 at 1218. Some perspective can be gained on the issue by looking at it from grievance arbitration's viewpoint and asking whether the express statutory policy of encouraging the practice and procedure of collective bargaining would be effectuated if this Board was to police all collective agreements to decide if disputes over the meaning of these documents also constituted a violation of *The Labour Relations Act*? We think not. Moreover, the complete absence of a deferral doctrine means that parties would face the prospect of incurring the expenditure of time, money and their patience in two proceedings – a prospect unlikely to contribute to a healthy collective bargaining relationship. In addition, there is no longer any doubt that labour arbitrators have

the jurisdiction and duty to consider public statutes that bear on the questions brought before them (unless the statute specifically provides otherwise) and there is considerable evidence that the arbitrators active in Ontario are not strangers to the provisions of *The Labour Relations Act* and the underlying policies. See *McLeod v. Egan, supra*; and, for example, arbitration cases considering whether a collective agreement exists in light of the provisions of *The Labour Relations Act. Automatic Screw Machine Co., Automotive Hardware Ltd.* (1970), 21 L.A.C. 255 (Shime); *Loblaw Groceries Co. Ltd.* (1972), 24 L.A.C. 369 (Shime). But see *Canada Labour Code* R.S.C. 1970 c. L-1 as amended, s. 54. Grievance arbitration is an institution centered on achieving industrial self-employment and has played a vital role in reducing industrial strife. See Arthurs, "Developing Industrial Citizenship: A Challenge for Canada's Second Century" (1967), 45 Can. Bar Rev. 786; Cox, "Reflections on Labor Arbitration" (1959), 72 Harv. L. Rev. 1482; Adams, "Grievance Arbitration and Judicial Review in North America" (1971), 9 Osgoode Hall L. J. 443; Weiler, "The Role of the Labor Arbitrator: Alternate Versions" (1969), 19 U. Tor. L. J. 16. Moreover, recent legislative change has sought to insure that arbitration remains a relatively inexpensive and expeditious process and the courts now evidence a willingness to defer to arbitral decisions save in the most exceptional circumstances. See *The Labour Relations Amendment Act, 1979*, S.O. 1979, c. 32. And see generally: *Douglas Aircraft Co. of Canada Ltd. v. McConnell et al.* (1979), 99 D.L.R. (3d) 385 (S.C.C.); *Heustis v. New Brunswick Electric Power Commission* (1979), 98 D.L.R. (3d) 622 (S.C.C.); *Association of Radio & Television Employees of Canada (CUPE-CLC) v. Canadian Broadcasting Ltd.* (1973), 40 D.L.R. (3d) 1 (S.C.C.); *Bell Canada v. Office and Professional Employees International Union, Local 131* (1973), 37 D.L.R. (3d) 561 (S.C.C.). When deferral is looked at in this light, it becomes less self-evident that a policy of giving full play to a process of dispute resolution manned and administered by the parties is inconsistent with the Board's broad statutory mandate aimed at encouraging the practice and procedure of collective bargaining. This is particularly the case if the Board's mandate is viewed not so much in terms of a proprietary interest in its unfair labour practice jurisdiction, but rather in the realization that the purpose of that jurisdiction is to contribute to labour relations stability and harmony. Accordingly, the arguments for and against a policy of deferral to grievance arbitration rely upon significant but conflicting values and this conflict in values, unsurprisingly – has established a "discretionary balance" on deferral questions. The Board will defer but deferral, either before or after arbitration is in no way automatic.

6. It is interesting that the National Labor Relations Board in the United States along with judicial encouragement has developed a very sophisticated doctrine of deferral to grievance arbitration even though grievance arbitration is only recommended to the parties by statute in that jurisdiction. Grievance arbitration is not required by the *National Labor Relations Act* and its related statutes, nor is there the requirement of a mandatory no strike – no lock-out pledge in every collective agreement. But notwithstanding the absence of such provisions, the National Labor Relations Board will defer to grievance arbitration procedures both before the constitution of an arbitration hearing (*Collyer Insulated Wire, A Gulf and Western Systems Corporation* (1971), 192 NLRB 837; 1971 CCH NLRB ¶23,385) and after the issuance of an arbitration award (*Spielberg Manufacturing Company* (1955), 112 NLRB 1080). In the former situation, the NLRB requires that the parties involved in disputes utilize contractually agreed upon methods of arbitration prior to seeking Board review and the Board retains jurisdiction over the matter:

"...solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a)

the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the [NLRA]. (See (1971), 192 NLRB 837 at 843; (1971), 77 L.R.R.M. 1931 at 1938.)"

In the latter situation, the NLRB will defer to an arbitration award provided (a) that the proceedings be fair and regular in their award; (b) that all parties previously agreed to be bound by the arbitration decision; (c) that the decision of the arbitration panel not be clearly repugnant to the purposes and policies of the NLRA; (d) that the arbitrator or arbitration panel clearly decided the issue on which deferral is sought; and (e) that the issue decided was within the competence of the arbitrator or panel. The last two requirements have arisen out of two recent cases, *Banyard v. NLRB* (1974), 505 F. (2d) 342 (D.C. Cir) and *Stephenson v. NLRB* (1977), 550 F. (2d) 325 (9th Cir), and indicate that the deferral doctrine cannot be characterized as analogous to that of an election of forums or an estoppel. The *Banyard* and *Stephenson* cases illustrate that the mere existence of previous arbitration proceedings is insufficient. The parties and the arbitrator must have put their minds to the unfair labour practice aspect of the case and explicitly dealt with it. See Comment – *Banyard v. NLRB* (1975), 88 Harv. L. Rev. 804; Comment – *Stephenson v. NLRB* (1977), 11 Loyola of L.A. L. Rev. 199; Nash, "Board Referral to Arbitration and *Alexander v. Gardner* – Denver: Some Preliminary Observations" (1974), 25 Lab. L. J. 259. More recently see: *Suburban Motor Freight Inc.* (1980), 247 NLRB No. 2; 103 L.R.R.M. 1113; *Servair, Inc. v. NLRB* (1979), 102 L.R.R.M. 2705 (9th Cir).

7. It may be that the Board's approach has been somewhat less refined but the American treatment of deferral issues is not inconsistent with Board jurisprudence. Cases like *Canadian Acme Screw and Gear Limited* (1954), 54 CLLC ¶17,083; *John Inglis Co. Ltd.* (1953), 53 CLLC ¶17,049; *National Showcase Co. Ltd.* (1961), 61 CLLC ¶16,185; *Heist Industrial Services Ltd.* (1963), 63 CLLC ¶16,263; *Wallace Barnes Co. Ltd.* (1961), 61 CLLC ¶16,198 and *Collingwood Shipyards*, [1967] OLRB Rep. July 376 all approach the deferral doctrine as one that will encourage the practice and procedure of collective bargaining. These cases are also aimed at discouraging dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement which they have created. See *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49. But it is also apparent that in those cases the Board acted on the premise that the resolution of the contractual issues was congruent with the resolution of the statutory unfair labour practice issues. See *Imperial Tobacco Products (Ont.) Ltd. et al.*, [1974] OLRB Rep. July 418 at para. 26. This congruence between the contractual dispute and the overlying unfair labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties. See *Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427 at para. 4. However, where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction. The former situation is reflected in *Thomas Built Buses Ltd.*, [1980] OLRB Rep. Feb. 264 and the latter can be seen in *New Gregory House*, [1977] OLRB Rep. Sept. 584. Other circumstances in which the Board has been unwilling to defer to grievance arbitration involve cases where

arbitration may have been unavailable to the complainant or where relief in that forum could have been inadequate. See *Wallace Barnes Company Ltd.* (1961), 61 CLLC ¶16,198 and the general discussion in *Imperial Tobacco Products (Ontario) Limited, supra*. Moreover, where the Board defers to the arbitration process it will nevertheless retain jurisdiction as the NLRB in order to insure (a) that the dispute over the meaning of the collective agreement is resolved with reasonable promptness; (b) that the arbitration procedures have been fair; and (c) that the outcome of arbitration is neither repugnant to the purposes of the Act nor remedially inadequate. See *Imperial Tobacco Products (Ontario) Limited, supra*, for a full discussion of these subsidiary principles. We are also of the view similar to positions taken in *Banyard* and *Stephenson, supra*, that the Board will not defer or will exercise its retained jurisdiction where the grievance or board of arbitration fails to deal directly and explicitly with the unfair labour practice issues.

8. In light of these principles, what in the instant case caused the Board to refuse to defer to grievance arbitration? The complaint centers on the grievor's union activity and a dismissal but these allegations will not usually, in themselves, be sufficient justification for Board intervention into a collective bargaining relationship or, at least, these matters will not usually constitute a *prima facie* case for labour board intervention. Most collective agreements provide for the appointment of union stewards and also provide for their activity within the context of the collective agreement. Disputes over the extent and exercise of these contractual rights are not unusual and will not normally rise to the level of a policy concern transcending the particular collective bargaining relationship. (See *Douglas Aircraft Co. of Canada Ltd. v. McConnell et al.* (1979), 99 D.L.R. (3d) 385; and *Firestone Steel Products of Canada Ltd.* (1975), 8 L.A.C. (2d) 164 (Brandt).) Moreover, the general requirement found in most collective agreements that discipline and discharge be effected only for just and sufficient cause will normally provide an adequate remedy if the allegation is made out on the evidence. See *Firestone Steel Products of Canada, supra*; and *Re Stancor Central* (1970), 22 L.A.C. 184 (Weiler). Indeed, many collective agreements contain a "no discrimination" provision wherein the employer explicitly promises that there will be no discrimination on the basis of union membership. For example, a disciplinary dispute over union activity within the context of a collective bargaining relationship that has existed for twenty or thirty years would seem to be amendable to resolution by the parties themselves by way of their own dispute resolution procedures. Deferral in such circumstances is more consistent with the practice and procedure of collective bargaining.

9. In the instant case, however, we are confronted with a dispute over union activity involving a probationary employee and this dispute arises under a first collective agreement. These features of the case caused the Board to exercise its unfair labour practice jurisdiction. The fact that the complaint arises in a first agreement context raised the question as to whether a remedy limited to reinstatement (if the allegations were proved) would be sufficient. The OLRB has an expansive remedial jurisdiction and most recently has developed a fairly sophisticated array of remedies including the posting of notices for the benefit of bargaining unit employees who may have been collaterally affected by an unfair labour practice directed at a fellow employee. See *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Kodiak Crane Corp.*, Board File 0549-80-U, July 18, 1980, as yet unreported; *Mount Forest Caskets Ltd.*, Board File No. 2117-79-U, June 3, 1980, as yet unreported; *G. W. Martin Lumber Ltd.*, Board File No. 2342-79U, May 29, 1980, as yet unreported; and *ABC Day Nursery & Kindergarten Ltd.*, [1980] OLRB Rep. Apr. 391. But more importantly, the rights of access of probationary employees to grievance arbitration is the subject of considerable debate in labour relations law

and this particular employer was not prepared to agree that no objection in this respect would be raised if the complaint was taken to arbitration. A brief review of the provisions of the instant collective agreement in light of recent case law on the access of probationary employees to arbitration underlines the basis to our concern about the efficacy of grievance arbitration in relation to this complaint.

THE PROBATIONARY EMPLOYEE

10. The principal provisions of the collective agreement bearing on this complaint include:

“ARTICLE II – UNION SECURITY

2.03(a) New employees shall make application for membership in the Union at the time of their hiring and shall become and remain members of the Union in good standing as a condition of employment as soon as their probationary period has been served.

ARTICLE III – MANAGEMENT

3.01 The Union agrees that the Employer has the exclusive right and power to manage its business, to control the direction of the staff including the right to plan, direct and control the operations, hire, suspend or discharge for good and sufficient cause, relieve employees from duty because of lack of work or other legitimate reasons. The right to establish and maintain reasonable rules and regulations covering the operation of the stores a violation of which shall be among the reasons for discharge, is vested in the Employer, provided, however, that the above rights shall be exercised to the provisions of the Grievance Procedure of the Agreement.

ARTICLE IV – DISCIPLINE OR PART-TIME EMPLOYEES

4.01 No part time employee shall be discharged or disciplined without good and sufficient cause.

4.02(a) The Employer agrees that, whenever an interview is held with an employee that becomes part of his record regarding his work or conduct, the store steward will be present as a witness. The employees may request that the store steward leave the meeting.

(b) During the interview, the employee and the store steward will be given an opportunity for consultation.

(c) In the event the steward is not present, the condition will be brought to the attention of the employee. The meeting that becomes part of the employee's record will be postponed until the steward is available.

(d) If the meeting is held without the steward, any conclusions,

verbal or written, will be null and void, except when the employee requests the steward to leave.

4.03 The Employer agrees that upon written request to head office management an employee or the Union, at Step 3, may view all documents pertaining to unsatisfactory conduct or work performance contained in the central personnel file when deemed necessary.

ARTICLE V – PROBATIONARY PERIOD

5.01 Upon completion of one hundred seventy five (175) hours of work, or an accumulation of sixteen (16) weeks in which hours have been worked, whichever comes first, employees covered by this Agreement shall be deemed to have served their probationary period and then shall be placed on the seniority list for part-time employees.

ARTICLE VII – NO DISCRIMINATION

7.01 The Employer agrees that there will be no discrimination on account of race, colour, creed, sex, age or membership in the Union.

ARTICLE IX – SENIORITY RIGHTS

9.01(a) For all new part-time employees, there shall be a probationary period as outlined in Article V and during such probationary period, the Employer shall have the right to discharge a probationary employee with or without good and sufficient cause. Such discharge shall not be subject to the terms of the Grievance Procedure. However, if an employee in continued in employment after such period, seniority shall commence from the commencement of such continuous employment.

ARTICLE XVIII – ADJUSTMENT OF GRIEVANCES

18.01 Either the Employer, the Union or any employee has a right to lodge a grievance with respect to any matter arising out of this Agreement or concerning the interpretation, application or alleged violation of this Agreement.

18.02 Any employee believing that he has been unjustly dealt with, or that the provisions of this Agreement have not been complied with, shall have the right to place such grievances in the hands of the Union, for review and adjustment by the Employer if necessary. Such grievances shall be processed as follows:

18.03 In the case of a discharge, a grievance may be filed by an employee who feels he was unjustly dealt with. Such a grievance must be filed within four (4) working days from the date of dismissal, and shall commence at Step 2. In any subsequent disposal of this case during the Grievance Procedure, the Employer may reinstate the employee with full back

pay, suspend the employee for a definite period or sustain the discharge, if mutually agreed to by the parties to this Agreement.”

11. The immediate problem the grievor would face at arbitration is Article 9.01(a). The employer is given the right to discharge a probationary employee with or without good and sufficient cause and such discharge is not to be subject to the terms of the grievance procedure. Counsel for the employer adverted to these provisions when questioned on the employer's understanding of the grievor's rights at arbitration were we to defer to that process. However, in emphasizing the presence of this contractual provision, we do not wish to be taken as having ignored the fact that substantial arguments exist in favour of the grievor's access to arbitration notwithstanding Article 9.01(a). For example, it might be argued that 9.01(a) cannot protect a dismissal that is contrary to law (i.e. *The Labour Relations Act*) and that, in any event, the parties could not have intended, by the probationary period, to give the employer the right to dismiss any employee for lawful union activity. See *Re Loblaw Groceries Co. Ltd. and UCRE* (1972), 24 L.A.C. 369 (Shime). Alternatively, emphasis might be placed on the impact of *The Labour Relations Act*, section 37 and, more particularly, section 37(1) and 37(2) which provide:

(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection 1, it shall be deemed to contain the following provision:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointed to an arbitration board. The recipient of the notice shall within five days inform the other party of the name of its appointee to the arbitration board. The two appointees so selected shall, within five days of the appointment of the second of them, appoint a third person who shall be the chairman. If the recipient of the notice fails to appoint an arbitrator, or if the two appointees fail to agree upon a chairman within the time limited, the appointment shall be made by the Minister of Labour for Ontario upon the request of either party. The arbitration board shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any employee or employer affected by it. The decision of a majority is the decision of the

arbitration board, but if there is no majority the decision of the chairman governs.

A number of labour boards have held that clauses which deny the resolution of a difference over the meaning of a collective agreement by way of grievance arbitration are void as contrary to the purpose of section 37(1). See for example: *American Motors (Canada) Ltd.*, [1973] OLRB Rep. April 211 application for judicial review denied in *Re American Motors (Canada) Ltd. and Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1285 et al.* (1974), 46 D.L.R. (3d) 75; 3 O.R. (2d) 528 (Ont. C.A.); *Cassiar Asbestos Corporation and United Steelworkers of America, Local 6536*, [1975] 1 Can LRBR 212; and *Canadian Airline Flight Attendants Association, Local No. 13 and Transair Ltd.*, [1978] 2 Can LRBR 354; prohibition denied (1978), 86 D.L.R. (3d) 85.

12. Unfortunately, the success of any or all of these arguments is not free from doubt. The “not contrary to law argument” has the complication of locating the legal and evidentiary onus. Must the grievor bear the burden of establishing the truth of his allegation and legal proposition on which she relies? There is no doubt on where these onuses lie before the Board. Moreover, what if the grievor’s union activity was but one reason of many for the grievor’s dismissal? Indeed, what if it played only a small part in the employer’s reasoning? A question arises as to whether any arbitrator selected by or imposed upon the parties would unhesitatingly apply “the taint” theory that lies at the basis of the Board’s approach to such matters. See *Westinghouse Canada Ltd.*, [1980] OLRB Rep. Apr. 577; *Barrie Examiner*, [1975] OLRB Rep. Oct. 745; and *Fielding Lumber*, [1975] OLRB Rep. Sept. 665. The section 37(1) and (2) argument is subject to a raging debate in both arbitral and judicial circles with respect to probationary employees. Speaking very broadly, to date at least two conflicting arbitral views over the interaction of section 37 and probationary employee contract clauses have evolved. One line of cases sees nothing inconsistent with section 37 where the parties agree that the dismissal of a probationary employee shall not be the subject of a grievance or an arbitration. See for example *Bell Canada and Communications Union Canada* (1977), 16 L.A.C. (2d) 236 (Kates); *Westinghouse Canada Ltd.* (Palmer, January, 1976, unreported); *Catholic Children’s Aid Society of Metropolitan Toronto* (Brown, March 19, 1976, unreported); *Children’s Aid Society* (O’Shea, September 26, 1977, unreported); *City of Toronto* (Roberts, November 27, 1978, unreported); *Community Services Board of the City of Sault Ste Marie* (1979), 21 L.A.C. (2d) 192 (Brent). Another group of cases takes the view that where the parties create a substantive right in the collective agreement, it would be contrary to section 37 to deny the arbitrability of that right by restricting access to the arbitration process. See for example *International Waxes Ltd.* (1977), 17 L.A.C. (2d) 62 (Schiff); *Toronto Star Newspapers Ltd.* (1978), 20 L.A.C. (2d) 392 (Prichard); *Toronto Hydro-Electric System* (Barton, August 1979, unreported). Judicial authority is equally counter-poised. Compare *International Waxes Ltd.* (1978), 79 CLLC ¶4,203 with *Toronto Hydro-Electric System* (1980), 80 CLLC ¶4,034. Just where the instant collective agreement would fit into this debate with its distinctive wording, which might be viewed as reposing a substantive right in the employer to dismiss probationary employees without just cause is a matter of considerable speculation. Against this background of conflicting authority and philosophy, it can hardly be said that the grievor has free access to grievance arbitration and that the policies underlying *The Labour Relations Act* would be best effected by deferral to that process. Indeed, this Board has recently experienced substantial delay in the resolution of a statutory complaint brought by a probationary employee where it deferred to grievance

arbitration. See *Phyllis Barr and Somerville Industries Limited* File No. 0758-76-U wherein the Board deferred to arbitration only to have the matter return to it a few years later. And see: *Re International Chemical Workers Union, Local 817 and Somerville Industries Ltd.* (1979), 24 O.R. (2d) 167; *Phyllis Barr v. Somerville Industries Limited*, [1979] OLRB Rep. June 577.

THE COMPLAINT

13. This then brings us to the substance of the grievor's complaint. She is thirty-one years old; has three children; and had recently returned to the work force now that all her children are in school and having successfully combatted cancer. Her employment with the employer was therefore her first job on returning to work and this job commenced on February 26, 1980. She was hired as a cashier stock clerk at \$3.25 per hour. She was employed at a new store that was to open March 5, 1980. At no time up to her termination on April 14, 1980 was she spoken to by any representative of the respondent's management about inadequate performance. Indeed, she consistently scored very high marks on price tests regularly administered to all employees. At the time of her dismissal she had worked 156.5 hours and had been scheduled to work another 20.5 hours during the week of April 14, 1980. We also find as a fact that some time shortly before her dismissal by E. T. Dragon, store manager, she had been advised by Dragon that if she "stuck it out to the end of her contract, the union would be going for full-time employment and [she] would get a full-time job".

14. We find as a fact that on the Tuesday before the grievor was terminated she was elected by her fellow employees as their union steward and Dragon was aware of her status in this respect on the date of her firing. The position of union or store steward is provided for by Article 17.01 of the collective agreement and, by Article 4.02, the steward is given an important status in disciplinary interviews.

15. On Saturday, April 12, 1980 the grievor was scheduled to report for work at approximately noon. She, however, called Dragon that morning to advise him that her children had chicken pox and she did not want to expose the babysitter to them. He advised her that she need not come in. However, she came in anyway to "cash-off", i.e. balance her weekly receipts, and to seek permission to switch her days off for the next week with another employee so that she could look after her children. The only person who had the next Monday and Tuesday off was Carol Etserig and Dragon approved the switch. The grievor returned home and did not work on Saturday, April 12, 1980. However, Carol Etserig did work that day and had her employment terminated by Dragon later that afternoon. She telephoned the grievor at home at approximately 6.30 p.m. that evening and requested her to find out why. The grievor therefore telephoned Dragon at his residence. She testified that he told her he could not discuss it then but would get back to her in a couple of days. She further testified that on Monday, April 14, 1980 Dragon telephoned her at home and told her that his reasons for terminating Etserig were none of her business or anyone else's. She said she therefore changed the subject and inquired about her hours for the week now that Etserig was terminated. Dragon said he would investigate and call her back. However, shortly thereafter she called the store and asked Keith Walker, the assistant store manager, whether she should come in on her hours or Etserig's hours. Walker told her to come in on the Wednesday, but then Dragon picked up the telephone. She testified that he told her "it won't work" and that "he had to let her go." She said he told her that they were going to have "personality clashes in the near and distant future" and that she had "extra-curricular activity behind the scene". She told him that

if it was the union steward's job that he "could have it" and Dragon said he did not say that. She asked about her marks, her work as cashier, and her floor work and Dragon said all were excellent. She said he told her that there had been no differences "in the past". She testified that subsequently she had conversations with Walker who expressed the opinion that her firing had been a mistake and that he could not believe she had been terminated. Walker was the grievor's immediate supervisor or, at least, she worked more closely with him than with Dragon. Debbie Yandt, a fellow employee, testified that the grievor got along with all employees in the bargaining unit and that in relation to a Betty O'Connor it was her, Debbie Yandt, who had had problems. She also testified that she (Yandt) had made very vociferous complaints to Dragon about apparent favouritism in scheduling hours and that no action had been taken against her.

16. E. T. Dragon testified. He reports to a Harry Ludgns and was assisted in setting up the store at 1337 London Road, Sarnia by Greg Batson and Peter Black. At the opening of the store there were eleven employees on staff and all were cashier stock clerks responsible for all aspects of the store's operation. He said he knew of the grievor's election as union steward and that, indeed, the ballot boxes had been stored in his office. He testified that the store did not maintain formal evaluation reports on employee performance save for the recording of shortages on the cash register. The grievor's performance on the cash register was satisfactory. It was his testimony that he had decided to dismiss Etserig a few weeks before April 12, 1980 and that he and Walker felt that both Etserig and the grievor should be dismissed. However, Walker testified that he was only advised of Dragon's decision to dismiss the grievor on April 14, 1980, the day she was dismissed. It was clear from his cross-examination that he did not share in or agree with Dragon's decision.

17. Etserig's dismissal was not contested by Local 175 and, on the evidence presented by the respondent, would not appear to have been motivated by anti-union animus in any way. Her termination occurred immediately after working out of another employee's float on the cash register. This breach of company policy caused a public disturbance when the other employee complained and the incident was in the wake of a series of previous errors on the cash register. However, there was no indication in the evidence that the grievor's job performance was in any way inadequate or subject to the problem's that plagued Etserig's performance.

18. Attempting to lay a foundation to the grievor's termination, Dragon told the Board that in the first week the store was being set up, Harry Ludgns told him he should dismiss the grievor "because she had a big mouth." He did not advise Dragon why he thought this but said Dragon would have the opportunity to do this over the next short period of time. Ludgns was not called to testify and over the next few weeks the grievor proved herself to be a good employee. We find that it is highly unlikely that Dragon was acting on this observation when he dismissed the grievor in the midst of her union steward duties over Etserig's termination. Had Dragon been seriously following Ludgns' advice we think it unlikely that he would have scheduled her to work past her probationary period during the week of April 14, 1980. Dragon testified that a second incident occurred on March 8, 1980 when Peter Black had an occasion to raise his voice at the grievor, telling her "to get busy" and that "she was not long for this company." Dragon said that Black also told him he should get rid of the grievor. However, the grievor denied the incident; Black was not called to testify; and, on Dragon's own admission, the grievor's subsequent job performance was excellent. Therefore, even if the second incident occurred, there would have been no reason to act on Black's outdated advice and the scheduling of the grievor during the week in question suggests that Dragon had no such precon-

ceived plan. His earlier approval of an exchange in work hours between Etserig and the grievor for the following week is further evidence of this. Dragon also testified that the grievor did not get along with her fellow employees and recalled a conflict he thought she had had with another employee, Betty O'Connor. However, on cross-examination and on the uncontested evidence of the grievor, the incident with Betty O'Connor involved Debbie Yandt and Dragon was aware that the grievor's fellow employees had elected her to represent them as union steward. Moreover, O'Connor was no longer an employee at the store when the grievor was dismissed. The grievor did complain to Dragon about the unfairness in the scheduling of her hours, but she did this privately and would appear to have been just one of a number of employees who voiced concern. Therefore, although Dragon testified that he and the grievor "did not get along", there is no objective evidence to support this assertion and the grievor's relationship with Keith Walker, her more immediate supervisor, was obviously good. Dragon testified that he felt the grievor "was trying to run things" but the only basis to this concern would have been the grievor's proper conduct as union steward in relation to Etserig's termination.

19. A union steward plays an important role in the collective bargaining process in the area of contract administration. Indeed, the instant collective agreement recognizes this fact. Inevitably, the union steward will have to seek information from and question management representatives about their actions or about work conditions. While these duties require diplomacy and tact if they are to be performed effectively, personality conflicts can arise. Such conflict, whether real or perceived, cannot be the basis for discipline unless it is accompanied by clearly improper conduct, i.e. abusive language, threatening, improper ridicule, physical contact. In the instant case, not only is there no hint of improper conduct, there is no objective evidence of a personality conflict between the grievor and Dragon. Union stewards cannot be in fear for their own jobs if they are to pursue effectively the legitimate grievances of fellow employees. A similar point was developed by Professor Brandt in *Re Firestone Steel Products* (1975) 8 L.A.C. (2d) 164 at 167-8 where he wrote:

"For the purposes of assessing whether or not conduct is insubordination the standard of conduct that the company is entitled to expect should be different when applied to the acts of union committeemen engaged in the legitimate discharge of their duties. For, . . . a committeeman is, while attempting to resolve grievances between employees and company personnel, always functioning on the border line of insubordination. His role is to challenge company decisions, to argue out company decisions and, if in the discharge of that role he is to be exposed to the threat of discipline for insubordination, his ability to carry out his role will be substantially compromised. This is not to say that a committeeman has a carte blanche to ignore at will management instructions and to instruct others not to carry them out. His immunity, if it may be called that, is limited to acts or omissions committed in the discharge of his functions and to acts or omissions which may reasonably be regarded as a legitimate exercise of that function. To put it succinctly, a committeeman is not entitled to punch a foreman in the nose as one of his means of attempting to bring about a settlement of a grievance.

Therefore, it is necessary in the instant case to determine whether or not the grievor was acting as a committeeman throughout the incident and secondly, if so, whether his conduct was, in that context, legitimate."

20. On the facts before the Board, we are not satisfied that the respondent, through Dragon, terminated the grievor for reasons unrelated to her status as a union steward and her inevitable questions of Dragon about the termination of a fellow employee. The fact that Debbie Yandt, the alternate union steward, was not and has not been terminated is immaterial in our view. Indeed, the obvious “chilling effect” of the termination of one union steward would make any additional termination unnecessary and much too obvious. In cases under section 79 of *The Labour Relations Act* the legal onus of establishing that its actions have not violated the statutory rights of grievors or complainants resides with the respondent employer and no part of an employer’s decision can be affected by an anti-union *animus*. See *Fielding Lumber Company Limited* [1975] OLRB Rep. Sept. 665 at para. 18; *The Barrie Examiner* [1975] OLRB Rep. Oct. 745 at para. 17; *The Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 299 at para. 4; and *Regina v. Bushnell Communications Ltd.* (1975), 2 O.R. (2d) 422; appeal dismissed, (1976) 4 O.R. (2d) 288 (Ont. C.A.). The following excerpt from *The Barrie Examiner, supra*, at para. 17 is representative of the burden shouldered by respondents under section 79(4a):

“In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.* [1974] OLRB 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer’s conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts — first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

21. In our view, the absence of previous conflict between Dragon and the grievor; the grievor’s good relationship with her immediate supervisor, Keith Walker; the grievor’s superior job performance; and the fact that her dismissal followed on the heels of her actions as union steward in the Carol Etserig matter, all go against Dragon’s assertion that he had simply got up the nerve to implement the previous advice of Messrs. Ludgns and Black. The grievor’s proper actions as union steward are not only supported by the collective agreement between the parties but by sections 3, 42, 56, 58 and 61 of *The Labour Relations Act*. The grievor, Local 175 and the other employees in the bargaining unit all have statutory rights to this effect. The grievor has a statutory right to act as she did. Her fellow employees have a statutory right to be so represented. And Local 175 has a statutory right to have employees act as union stewards on its behalf. In our view, these rights are fundamental to effective collective bargaining and contract administration. See *J. Harris & Sons Ltd. et al* (1960), 60 CLLC ¶16,177.

REMEDY

22. This then brings us to the appropriate remedy. It goes almost without saying that the grievor is to be immediately reinstated to her former position and that she is to be compen-

sated for all lost wages and benefits together with interest. We so award. See *Hallowell House* [1980] OLRB Rep. Jan. 35. But is this sufficient? We think not. In *Radio Shack* [1979] OLRB Rep. Dec. 1220 the Board recently reviewed its approach to remedies and their central importance to effectuating the policies of and rights conferred under the Act. It emphasized the need to use its experience in the tailoring of remedies to meet the needs of individual cases. In this respect it wrote (at pages 1253-1254):

“Section 79(4) is the section of the Act under which remedies of the kind relevant to this case are made. Its very open-ended wording presents this Board with both the greatest opportunity to fashion carefully tailored effective remedies and the greatest temptation to exceed proper statutory bounds. The Solomonic difficulty in applying the broad powers granted to the Board under this section are apparent from the words used.

‘79(4) . . . where the Board is satisfied that an employer, . . . has acted contrary to this Act it shall determine what, if anything, the employer, . . . shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, any one or more of,

- (a) an order directing the employer, . . . to cease doing the act or acts complained of;
- (b) an order directing the employer, . . . to rectify the act or acts complained of; or
- (c) an order . . . to compensate in lieu of hiring or reinstatement for loss of earning or other employment benefits in an amount that may be assessed by the Board against the employer, . . .’ . . .

It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop “boiler plate” remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance

with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, *A Touchstone for Labour Board Remedies* (1968), 14 Wayne L. Rev. 1039; Ross, *Analysis of Administrative Process Under Taft-Hartley*, [1966] Lab. Rel. Yearbook 299. . . ."

23. In the *Radio Shack* case itself an array of remedies were utilized, many for the first time, in an attempt to redress the pervasive unlawful conduct present in that case. These remedies included damages for breach of the bargaining duty; posting of notices, mailing of notices; trade union access to company bulleting boards, to employee addresses, and to employees on company premises; cease and desist directions; and trade union "equal right of reply" rights at all labour relations meetings convened with bargaining unit employees by the company on its premises and time. New and important remedies were also developed and applied in *Westinghouse*, [1980] OLRB Rep. Apr. 577, in order to redress the complex impact of unlawful acts involving the relocation of a plant. But it is too easy to characterize these cases as exceptional and to forget about the remedial needs of the "run of the mill" unfair labour practice case, whether it involves an isolated dismissal, a change in working conditions, or some other act which comes nowhere close to the kind and range of conduct dealt with in the *Radio Shack* and *Westinghouse* cases. The Board must, however, resist this tendency. Recently, in *Hallowell House*, *supra*, the Board indicated that it would award interest in all cases involving a money order as an additional remedy. The Board has accepted that it should not develop remedies which are primarily aimed at punishment, but the *quid pro quo* for this restraint must be that all remedies are fully compensatory. *Hallowell House* dealt with the concept of full compensation in an economic sense.

24. However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant "chilling effect" on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The mere reinstatement of the employee directly affected, with backpay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist for those occasions where he will not. (Indeed, if the experience in the United States indicating that only a small percentage of NLRB reinstated employees have the courage or will to return to work is applicable in Ontario, our reinstatement remedy may be ever less effective than this. See Stephens and Chaney, "A Study of the Reinstatement Remedy Under the National Labor Relations Act" (1974), 25 Lab. L.J. 31. However, one principal difference between the NLRB and the Board is the greater speed with which remedies may be mobilized and finalized under Ontario's *Labour Relations Act*. This factor may be an important difference to the effectiveness of our reinstatement orders.) We would add that our concern for remedial effectiveness is not

limited to situations where employers are respondents. Trade unions have important obligations under the statute as well and individual employees who are mistreated by them must also be assured of future lawfulness. One of the unique remedies developed by labour relations agencies to respond to the psychological impact of unfair labour practices requires the offender, whether employer or union, to communicate to employees affected by an unfair labour practice that it has been found guilty of violating statutory labour laws and that it will henceforth conform to their requirements. This remedy, in the usual form of a posting of a notice for sixty days in a conspicuous location(s) in the workplace, was first developed by the Board in *Radio Shack, supra*, although its origin in labour law is ancient. See for example: *The Falk Corporation* (1940), 308 U.S. 453, 5 LRRM 677 at p. 682; *Bradford Dyeing Association* (1940), 310 U.S. 318, 6 LRRM 703 at p. 715. In more exceptional cases the posting of a notice will be insufficient and mailing, publishing, and reading of notices may be directed in order to redress the impact of unfair labour practices in question. See *Radio Shack, supra*, at p. 1270. See also Comment, *Labor Remedies* (1968), 54 Virginia L. Rev. 38 at p. 48. And more generally, Comment, *NLRB Remedies — Moving Into The Jet Age* (1975), 27 Baylor L. Rev. 292. However, we believe the posting of notices should not be confined to exceptional cases because isolated violations of the Act have an undoubted and significant psychological impact on labour relations and the attainment of the statute's objectives. Making employees aware of the fact that an errant employer or trade union cannot violate the Act and that the employee has meaningful legal rights is vital to the success of *The Labour Relations Act*. Admittedly, the effect of the posting requirement often will be difficult to evaluate but this is no reason for inaction. Surely, for example, the fear for job security will be lessened with the realization that someone more authoritative than the employer has a voice in determining what he can do to those who support a trade union and that someone more powerful than a trade union will protect those who lawfully oppose it. Even a belated notice is better than none, if it helps to dispel any fears, confusion or ill-will created by a situation which has been equitably resolved.

25. In the instant case, and in accord with our observations on the importance of posting notices, we further direct the respondent to cease and desist in the interference with the representation of bargaining unit employees by the trade union and representatives and to post the attached notice at its place of business at 1337 London Road, Sarnia.

ORDER

26. The Board directs the respondent:

- (i) to immediately reinstate Valerie Henrie to her position of cashier stock clerk and to compensate her for all lost monies and benefits together with interest thereon;
- (ii) to cease and desist in its interference with the representation of bargaining unit employees by the Canadian Food and Allied Workers, Local 175 and its designated representatives;
- (iii) to post at its place of business at 1337 London Road, Sarnia, copies of the attached notice "Appendix". Copies of such notice, to be furnished by the Registrar, shall, after being duly signed by an authorized representative of the respondent, be posted immediately upon receipt thereof, and be maintained for a period of 60 consecutive working days thereafter, in

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to insure that such notices are not altered, defaced, or covered by any other material. Representatives of the complainant trade union shall have reasonable access to the respondent's premises to insure that the respondent has complied with this directive.

PARTIAL DISSENT OF J. A. RONSON:

1. The majority decision sets forth what amounts to a universal policy concerning the posting of notices. I cannot agree that in every case a notice should be posted.

2. In order for a remedy not to be punitive, it should arise and be granted out of and as a result of evidence before the Board which clearly demonstrates the need for the remedy. There is no evidence of such need in this case, and with such a small group of employees, the information grapevine is very short.

3. In my opinion, the complaint arises because a manager was completely unaware of the rights of a union steward, and the resulting obligations upon the employer arising out of the provisions of the Act. To tar the employer with anti-union animus by ordering a posting, when the evidence discloses no basis for such animus but rather personal differences between the manager and the steward, is both unfair and punitive.

4. If the Board is concerned with the psychological impact of an unfair labour practice complaint on the bargaining relationship, it may well have to consider whether the same impact should be countered when it is obvious that a case is without merit and such fact should have been obvious to the complainant. The effect of tarring an employer with anti-union motives by laying a complaint that is without merit cannot be redressed by simply accepting that the employer can post a copy of the Board's decision on its notice board. Some people, no doubt, would feel that the employer was gloating over its "win".

5. In this case the trade union laid a second complaint regarding the dismissal of a second employee. It was withdrawn at the start of the hearing. The evidence at the hearing was to the effect that the employer had good and valid cause for deciding to terminate. To prevent imbalance, this fact should also be stated in the Board's notice.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

Pursuant to a Decision and Order of the Ontario Labour Relations Board and in order to effectuate the policies of The Labour Relations Act we hereby notify our employees that:

After a hearing in which both sides had the opportunity to present their evidence, the Ontario Labour Relations Board has found that we violated The Labour Relations Act by discharging Valerie Henrie and has ordered us to post this notice and keep our word about what we say in this notice.

WE WILL NOT discourage membership in or representation by the Canadian Food and Allied Workers, Local 175.

WE WILL deal with union stewards appointed under the collective agreement in a manner consistent with that agreement and the provisions of The Labour Relations Act.

WE WILL offer to reinstate Valerie Henrie to her former position without prejudice to seniority or other employment rights and benefits and we will pay her for monetary losses together with interest thereon arising from her termination.

VALDI INC.
(trading as Valdi Discount Foods)
Per: (Authorized Representative)

Dated: August 25, 1980

This is an official notice of the Board and must not be removed or defaced
This notice must remain posted for 60 consecutive working days.

1047-79-U Ontario Secondary School Teachers' Federation, District II,
Applicant, v. **York County Board of Education**, Respondent.

Lock-Out – Practice and Procedure – Elements for legal lock-out under The School Boards and Teachers Negotiations Act, 1975 considered – Whether closing school during lawful strike lock-out – Whether declaration issuing (Decision of Board Member C. G. Bourne – Majority decision reported [1980] OLRB Rep. July)

BEFORE: M. G. Picher, Vice-Chairman and Board Members C. G. Bourne and B. K. Lee.

DECISION OF BOARD MEMBER C. G. BOURNE; August 19, 1980

1. I concur with the findings of the Vice-Chairman as summarized in the final paragraph of this decision.
 2. As it has been determined that a lock-out was in effect there is no need to elaborate on the motives of the Board of Education which believed it was closing the schools under section 69(4)(c) of The School Boards and Teachers Collective Negotiations Act.
 3. However, I have to disagree with the motives ascribed to the Board of Education in so declaring. Granted that there was frustration, disappointment and, understandably anger – on both sides may it be noted – these are familiar reactions in long and bitter negotiations which experienced negotiators take in their stride. I believe, from the evidence given by so many trustees, that despite the emotional overtones, they acted as they did in all conscience, as responsible mature individuals after careful investigation, discussion and evaluation of the facts before them.
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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1980

BARGAINING AGENTS CERTIFIED DURING JULY

No Vote Conducted

1093-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Kaymick Enterprises Limited (Respondent).

Unit: "all employees of the respondent working within a radius of 35 miles from the City of Sudbury Federal Building, engaged in the operation of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foreman." (2 employees in the unit).

2136-79-R: Ontario Nurses' Association (Applicant) v. Wilson Memorial General Hospital (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Marathon, save and except Director of Nursing and persons above the rank of Director of Nursing." (19 employees in the unit).

2210-79-R: Office and Professional Employees International Union (Applicant) v. Retail Clerks Union, Local 206, Chartered by the United Food and Commercial Workers International Union (Respondent).

Unit: "All office and clerical employees of the respondent at Kitchener, Ontario, save and except secretary-treasurer, president and chief executive officer, and persons above those ranks." (3 employees in the unit).

2360-79-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Applicant) v. Carrousel Farms Limited (Respondent),

- and -

2361-79-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Applicant) v. Carrousel Farms Limited (Respondent).

Unit #1: "all employees of the respondent at its retail stores in the Regional Municipality of Ottawa-Carleton, save and except assistant store managers, persons above the rank of assistant store manager, bookkeeper, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in the unit).

Unit #2: "all employees of the respondent at its retail stores in the Regional Municipality of Ottawa-Carleton regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant store managers, persons above the rank of assistant store manager and bookkeeper." (35 employees in the unit).

2470-79-R: International Molders & Allied Workers Union (Applicant) v. Southern Wood Products Limited (Respondent).

Unit: "all employees of the respondent at West Lorne, Ontario, save and except foremen, persons above the rank of foreman and office staff." (40 employees in the unit).

0022-80-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. R.A. Gill Limited, carrying on business as Gill Brothers Store, Bob's Husky House, Bob's Husky Travel Centre, Doug's Husky House, The Snack House, Gill Brothers Husky Service Retail, Husky Bulk Sales (Dryden), Gill Brothers Trucking, Gill Bulk Sales, Gill Distributors, Gill Brothers Husky Service Bulk, Dryden Distributors, Doug's Husky Service Retail, The Trading Post, and Doug's Husky Service Bulk (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the geographical District of Kenora, including the Patricia Portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0128-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Plibrico (Canada) Limited (Respondent) v. Labourers' International Union of North America, Local 837 (Intervener).

Unit: "all employees of the respondent in the Regional Municipality of Niagara and the County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0156-80-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Petrolia (Respondent).

Unit: "all employees of the respondent in the Town of Petrolia, save and except non-working foremen, persons above the rank of non-working foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (15 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0175-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Del Realty Incorporated (Property Management Division) and Peel Condominium Corporation 112 (Respondents).

Unit: "all employees of the respondents engaged in cleaning and maintenance at 20 and 50 Mississauga Valley Blvd., Mississauga, Ontario, including resident superintendents, save and except property manager, persons above the rank of property manager, office and clerical staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

0211-80-R: London and District Service Workers' Union Local 220, SEIU, AFL, CIO, CLC (Applicant) v. St. Mary's General Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all lay office and clerical employees of the respondent at Kitchener, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (80 employees in the unit). (*Having regard to the agreement of the parties*).

0257-80-R: Hotel, Motel and Restaurant Employees' Union Local 442 (AFL, CIO, CLC) (Applicant) v. K.V.B. Limited carrying on business as A La Crepe Bretonne (Respondent).

Unit #1: "all employees of the respondent at Niagara Falls, Ontario, save and except assistant manager, persons above the rank of assistant manager, chief crepiere, hostesses, office staff, students employed

during the school vacation period and persons regularly employed for not more than 24 hours per week.” (16 employees in the unit).

Unit #2: “students employed during the school vacation period and employees regularly employed for not more than 24 hours per week by the respondent at Niagara Falls, Ontario, save and except assistant manager, persons above the rank of assistant manager, chief crepiere, hostesses and office staff.” (15 employees in the unit).

0262-80-R: Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL, CIO, CLC (Applicant) v. Canadianna Nursing Homes Limited (Respondent).

Unit: “all employees of Canadianna Nursing Homes Limited, Chatham, Ontario save and except professional medical staff, registered nurses, graduate nurses, supervisors, persons above the rank of supervisor and office staff.” (64 employees in the unit). (*Having regard to the agreement of the parties*).

0321-80-R: Labourers’ International Union of North America, Local Union 183 (Applicant) v. Carter Horwood Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all field employees of the respondent engaged in surveying operations in and out of the Town of Markham, save and except party chiefs, persons above the rank of party chief, draftsmen, sales, office and clerical staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0338-80-R: Labourers’ International Union of North America, Local 183 (Applicant) v. I. M. Pastushak Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, those above the rank of party chief, draftsmen, and sales, office and clerical staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0387-80-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Peel Condominium Corporation #149 (Respondent).

Unit: “all employees of the respondent engaged in cleaning and maintenance at 2929 Aquitaine Avenue, Mississauga, Ontario, including resident superintendents, save and except property manager, office and clerical staff.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0409-80-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Queensway-Carleton Hospital (Respondent) v. Group of Employees (Objectors).

Unit #1: “all employees of the respondent in Nepean, Ontario, save and except professional medical staff, registered and graduate nurses, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, chief engineer, technical personnel, professional personnel, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements.” (195 employees in the unit). (*clarity note*).

Unit #2: (*See Applications for Certification Dismissed, Decisions June 1980*).

0414-80-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Applicant) v. Rudolph’s Specialty Bakeries Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all driver salesmen of the respondent in Metropolitan Toronto, save and except route supervisors and persons above the rank of route supervisor.” (45 employees in the unit). (*Having regard to the agreement of the parties*).

0419-80-R: Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees (Applicant) v. Elan Holidays Incorporated (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales representatives and executive secretaries." (20 employees in the unit). (*Having regard to the agreement of the parties*).

0422-80-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. London Motor Products Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, cashier, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (34 employees in the unit). (*clarity note*).

0423-80-R: Retail Clerks Union, Local 206 (Chartered by the United Food and Commercial Workers International Union) (Applicant) v. Canadian Funeral Management (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at and out of Hamilton, save and except managers and persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit).

0424-80-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: "all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 3078 Dougall Avenue, in the City of Windsor, Ontario, save and except hostesses and persons above the rank of hostess." (47 employees in the unit). (*Having regard to the agreement of the parties*).

0467-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Catalytic Enterprises Limited (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Unit #2: "all employees of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0468-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Catalytic Enterprises Limited (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in survey work, save and except party chief and persons above the rank of party chief." (2 employees in the unit).

Unit #2: "all employees of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, engaged in survey work, save and except party chief and persons above the rank of party chief." (2 employees in the unit).

0469-80-R: Canadian Union of Public Employees (Applicant) v. Ontario Humane Society (Respondent).

Unit: "all employees of the respondent working at and out of the Town of Whitby, save and except office staff and area superintendent." (10 employees in the unit).

0483-80-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Applicant) v. Kajba Company Limited and Adolf Osterman carrying on business under the firm name and style of Country Style Donuts (Respondent) v. Canadian Chemical Workers' Union (Intervener) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent engaged at its retail outlet at 99 Dundas Street East, Mississauga, Ontario, save and except Store Managers, persons regularly employed for not more than 24 hours per week, students employed during the school vacation." (7 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week engaged at the retail outlet of the respondent at 99 Dundas Street East, Mississauga, Ontario." (8 employees in the unit). (*Having regard to the agreement of the parties*).

0498-80-R: Ontario Nurses Association (Applicant) v. Marycrest Home for the Aged (Respondent).

Unit: "all lay registered and graduate nurses employed in a nursing capacity by the respondent in Peterborough, Ontario, save and except the nursing supervisor." (11 employees in the unit). (*Having regard to the agreement of the parties*).

0499-80-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. T. Puckrin & Son Limited (Respondent).

Unit: "all employees of the respondent working at Whitby, Ontario, save and except foremen, those above the rank of foreman, dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed for the school vacation period." (23 employees in the unit). (*Having regard to the agreement of the parties*).

0500-80-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) (Applicant) v. NETP Limited (Respondent).

Unit: "all office and clerical employees of the respondent in Niagara Falls, Ontario, save and except supervisors, persons above the rank of supervisor, salesmen, secretary to the Vice-President, employees regularly employed for not more than 24 hours per week and persons covered by a subsisting collective agreement between the respondent and the United Automobile Workers, Local 199." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0501-80-R: Canadian Union of Public Employees (Applicant) v. Spruce Haven Nursing Company Limited (Respondent).

Unit #1: "all employees of the respondent in Norwood save and except professional medical staff, registered nurses, graduate nurses, graduate dietitians staff, director of nurses, persons above the rank of director of nursing, persons regularly employed for not more than 24 hours per week and students employed in the school vacation period." (17 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in Norwood regularly employed for not more than 24 hours per week and students employed in the school vacation period, save and except professional medical staff, registered nurses, graduate nurses, graduate dietitians, student dietitians, office, clerical and

technical staff, director of nurses and persons above the rank of director of nursing.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

0512-80-R: Canadian Union of Public Employees (Applicant) v. Peel Association for Handicapped Adults (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Peel, save and except supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

0514-80-R: Christian Labour Association of Canada (Applicant) v. Errinrunc Limited (Respondent).

Unit #1: “all employees of Errinrunc Limited employed at Thornbury, Ontario, save and except Director of Nursing, Supervisors, persons above the rank of supervisor, registered and graduate nurses, office staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (12 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees regularly employed for not more than 24 hours per week and students employed during the school vacation period of Errinrunc Limited at Thornbury, Ontario, save and except director of nursing, supervisors, persons above the rank of supervisor, registered and graduate nurses, and office staff.” (24 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #3: “all registered and graduate nurses, save and except director of nursing, supervisors and persons above the rank of supervisor.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

0515-80-R: Service Employees Union, Local 204, affiliated with AFL, CIO, CLC (Applicant) v. Mini Skools Limited (Respondent).

Unit: “all employees of Mini Skools Limited at 685 Sheppard Avenue East, Toronto, Ontario, save and except supervisors, persons above the rank of supervisors, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period.” (30 employees in the unit). (*Having regard to the agreement of the parties*).

0530-80-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Ottawa Health Sciences Centre General Hospital (Respondent).

Unit: “all Building Control Centre Operators and Building Equipment Operators responsible for the operation of environmental control equipment employed by the Ottawa Health Sciences Centre General Hospital in the City of Ottawa, save and except foremen and supervisors, persons with a rank equivalent to and superior to foremen and supervisors, office and clerical staff, technical staff and persons covered by subsisting collective agreements between the Ottawa Health Sciences Centre General Hospital and the Canadian Union of Public Employees and the Ontario Public Service Employees’ Union and all nursing staff.” (10 employees in the unit). (*Having regard to the agreement of the parties*).

0544-80-R: United Steelworkers of America (Applicant) v. Canadian Appliance Manufacturing Company Limited (Respondent).

Unit: “all employees of the respondent in Kitchener, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (12 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0548-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Patricia Crane Service (Dryden) Limited (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province on Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

Unit #2: “all employees of the respondent in the District of Kenora, including the Patricia Portion, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank on non-working foreman.” (2 employees in the unit).

0556-80-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Robert Basil Lee Limited (Respondent).

Unit: “all field employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, those above that rank of party chief, sales, office and clerical staff.” (2 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0561-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. 3 Hills Construction (Respondent).

Unit: “all employees of the respondent in the County of Wentworth including part of the Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

0562-80-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Markwill Industries (1979) Limited and Eco Exploration Company Limited (Respondents).

Unit #1: “all carpenters and carpenters’ apprentices employed by the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondents in the District of Kenora, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

0564-80-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Sky Top Development Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent engaged in cleaning and maintenance at 140 Ernest Avenue, North York, Willowdale, Ontario, including resident superintendents, save and except property manager, office and clerical staff.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0576-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Belfor & Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman, office and sales staff." (14 employees in the unit).

0577-80-R: United Steelworkers of America (Applicant) v. Elkel Metal Products Limited (Respondent).

Unit: "all employees of the respondent in Brantford, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (26 employees in the unit). (*Having regard to the agreement of the parties*).

0578-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Coca-Cola Limited (Respondent).

Unit: "all office employees of the respondent at Kitchener, Ontario, save and except office manager, persons above the rank of office manager, foremen and sales supervisors and employees covered by an existing collective agreement between the applicant and the respondent." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0583-80-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Travelways School Transit Limited (Mississauga Division) (Respondent).

Unit: "all employees of the respondent, save and except foreman, manager, persons above the rank of manager and office staff." (92 employees in the unit). (*Having regard to the agreement of the parties*).

0585-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. C. E. Dotterill Limited (Respondent).

Unit: "all employees of the respondent engaged in surveying operations in and out of Metropolitan Toronto, save and except party chiefs, those above the rank of party chief, sales, office and clerical staff." (3 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0586-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Goldlist Property Management (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 1477, 1547 and 1563 Mississauga Valley Blvd., Mississauga, Ontario, including resident superintendents, save and except property manager, office and clerical staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

0587-80-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local No. 304 (Applicant) v. Laura Secord, Division Ault Foods (1975) Limited, Les Aliments Ault (1975) Ltee., (Respondent).

Unit: "all employees of the respondent at 24 Progress Avenue, Scarborough, Ontario, save and except supervisors, persons above the rank of supervisor, quality control employees, office staff, persons employed for not more than 24 hours per week and students employed during the school vacation periods." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0588-80-R: Retail Clerks Union, Local 409 (Applicant) v. Best Western Motor Inns Limited (Respondent).

Unit: "all employees of the respondent at Dryden, save and except department heads, persons above the rank of department head, office staff, persons regularly employed for not more than 24 hours per week,

and students employed during the school vacation period.” (60 employees in the unit). (*Having regard to the agreement of the parties*).

0591-80-R: Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. McGrath Transport Limited (Respondent).

Unit: “all employees of the respondent working at and out of Mississauga, save and except foremen, those above the rank of foreman, office and sales staff, those regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (36 employees in the unit). (*Having regard to the agreement of the parties*).

0592-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Argyle Drivers (London) Limited (Respondent).

Unit: “all employees of the respondent working at London, Ontario, save and except foremen, persons above the rank of foreman, sales and office staff and vehicle repair and maintenance staff.” (35 Employees in the unit). (*Having regard to the agreement of the parties*).

0605-80-R: Labourers’ International Union of North America, Local 1089 (Applicant) v. Jafsc Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

0613-80-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q. (Respondent).

Unit: “all waitresses, waiters, busboys, kitchen staff and cashiers employed by the respondent at 181 Eglinton Avenue, in the City of Toronto, save and except hostesses and persons above the rank of hostess.” (45 employees in the unit). (*Having regard to the agreement of the parties*).

0617-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Colvu Contracting Limited (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Picketing in the County of Ontario, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0618-80-R: International Union of Operating Engineers Local 793 (Applicant) v. Rapid Welding & Auto Repair Limited (Respondent).

Unit: “all employees of the respondent at Thunder Bay, Ontario.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0622-80-R: Energy and Chemical Workers Union (Applicant) v. Almatex Limited (Respondent) v. Oil, Chemical & Atomic Workers International Union (Intervener).

Unit: “all research laboratory staff employed by the respondent at its plant at 65 Duke Street, London, Ontario, save and except group leaders, persons above the rank of group leader and laboratory

employees covered by a subsisting collective agreement between the respondent and Oil, Chemical & Atomic Workers International Union and its Local 9-834.” (15 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0623-80-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied employees, Local Union 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Remex (Canada) Limited (Respondent).

Unit: “all employees of the respondent working in the City of Mississauga, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (73 employees in the unit). (*Having regard to the agreement of the parties*).

0628-80-R: Canadian Union of Public Employees (Applicant) v. Hamilton Society for the Prevention of Cruelty to Animals (Respondent).

Unit: “all employees of the respondent at Hamilton, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant kennel master, persons above the rank of assistant kennel master, and the confidential secretary to the general manager.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

0637-80-R: International Union of Electrical, Radio and Machine Workers (Applicant) v. International Systcoms Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the City of Brockville, save and except managers, foremen, foreladies, test supervisors and persons above the rank of manager, foreman, forelady and test supervisor and office clerical staff.” (25 employees in the unit). (*Having regard to the agreement of the parties*).

0642-80-R: United Steelworkers of America (Applicant) v. Specialty Cast Metals Limited (Respondent).

Unit: “all employees of the respondent at Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, technical and professional staff, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (27 employees in the unit). (*Having regard to the agreement of the parties*).

0643-80-R: United Steelworkers of America (Applicant) v. Kendall Canada, Division of C.K.R. Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: “all Quality Assurance Laboratory Technicians employed by the respondent at its manufacturing facilities, located at its Curity Avenue location, in the Borough of East York, save and except supervisors, persons above the rank of supervisor, those regularly employed for not more than 24 hours per week, and persons covered by subsisting collective agreements.” (14 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0671-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Waynco Limited (Respondent).

Unit: “all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, Elgin, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit).

0678-80-R: Canadian Union of Public Employees (Applicant) v. Visiting Homemakers Association of Ottawa (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except District Supervisor II, the secretary to the Executive Director, and homemakers." (14 employees in the unit). (*Having regard to the agreement of the parties*).

0681-80-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Applicant) v. The Great Atlantic and Pacific Company Limited (Respondent).

Unit: "all employees of the respondent at its grocery, produce and frozen food distribution centres at Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except those employees covered by a subsisting collective agreement between the parties dated March 29, 1979." (85 employees in the unit). (*Having regard to the agreement of the parties*).

0682-80-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Applicant) v. Spalding Canada, a division of Questor Commercial Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and office staff." (11 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

0689-80-R: International Union of Operating Engineers Local 793 (Applicant) v. R.A. Hume & Sons Contracting Limited (Respondent).

Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0690-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Capital Paving Limited (Respondent).

Unit: "all employees of the respondent in the County of Wentworth including part of the Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0715-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Agnew Baillie Contr. Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, excluding and industrial, commercial and institutional sector, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0719-80-R: Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. A. Cupido Haulage Limited (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent working at Hamilton, save and except dispatcher, persons above the rank of dispatcher, office and sales staff, brokers and persons regularly employed for not more than 24 hours per week." (23 employees in the unit). (*Having regard to the agreement of the parties*).

0722-80-R: Canadian Union of Public Employees (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit #1: "all employees of the respondent engaged in cleaning services at Crockford, Pavillion, (Scarborough General Hospital), Scarborough, Ontario, save and except supervisors and those above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Applications Dismissed – No Vote Conducted*).

0734-80-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada – Local Union 628 (Applicant) v. Raken Contractors Limited (Respondent).

Unit: "all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices, pipe fitters and pipe fitters' apprentices in the employ of the respondent in the district of Rainy River excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0739-80-R: Retail Clerks Union, Local 409 (Applicant) v. Best Western Motor Inns Limited (Respondent).

Unit: "all employees of the respondent at Dryden, who are regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except department heads, persons above the rank of department head and office staff." (20 employees in the union). (*Having regard to the agreement of the parties*).

0740-80-R: United Steelworkers of America (Applicant) v. Infatool Limited (Respondent).

Unit: "all employees of the respondent at Ingersoll, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (11 employees in the unit). (*Having regard to the agreement of the parties*).

0747-80-R: International Union of Operating Engineers Local 793 (Applicant) v. R.A. Hume and Sons Contracting Limited (Respondent).

Unit: "all employees of the respondent in Counties of Brant and Norfolk, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0758-80-R: International Union of Operating Engineers Local 793 (Applicant) v. Kast Engineering & Construction Limited (Respondent).

Unit: "all employees of the respondent working in the Regional Municipality of Niagara and the County of Haldimand, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the

repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in the unit).

0770-80-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Richard D. Steele Construction (1979) Limited (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in the unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the geographical Townships of Elizabethtown, Augusta, and Edwardsburgh and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in the unit).

0771-80-R: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. C.M. & Superior Drywall & Painting Company Incorporated (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th Parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

0772-80-R: Ontario Nurses’ Association (Applicant) v. The Board of Health of the County of Bruce Health Unit (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by Bruce County Health Unit in Bruce County, save and except the Director of Nursing and those above the rank of Director of Nursing.” (10 employees in the unit). (*Having regard to the agreement of the parties*).

0808-80-R: United Brotherhood of Carpenters and Joiners of America Local 1669 (Applicant) v. Northland Building Products (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0178-78-R: Labourers’ International Union of North America Local 527 (Applicant) v. Right Forming Limited (Respondent) v. Operative Plasterer’s and Cement Masons’ International Association of the United States and Canada, Local 124, Ottawa-Hull (Intervener).

Unit: “all cement masons and cement masons’ apprentices and helpers in cement finishing work on all concrete construction in the Counties of Peterborough, Northumberland, Lennox and Addington, Leeds, Frontenac, Grenville, Dundas, Stormont, Glengarry, Prescott, Russel, Lanark, Renfrew, Prince Edward and the Regional Municipality of Ottawa-Carleton, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

Number of names of persons on revised voters’ list	6
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1

0236-80-R: Labourers' International Union of North America, Local 837 (Applicant) v. Pigott Construction Limited (Respondent) v. Local 298 (598) of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Intervener #1) v. The International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Intervener #2).

Unit #1: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots		3
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener #1	0	

Unit #2: "all cement masons and cement masons' apprentices in the employ of the respondent in the industrial, commercial and institutional sector in the County of Wentworth including part of the Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note*).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	2	
Number of ballots marked in favour of intervener #1	0	

Applications Certified Subsequent to Post-Hearing Vote

1804-79-R: Amalgamated Clothing and Textile Workers Union – Toronto Joint Board (Applicant) v. Addidas Textile (Canada) Limited (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (125 employees in the unit).

Number of names of persons on revised voters' list		121
Number of persons who cast ballots		111
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	105	
Number of ballots marked against applicant	5	

2228-79-R: The International Association of Machinists and Aerospace Workers (Applicant) v. Cochrane Tool & Design Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Town of Markham, save and except foremen, persons above the rank of foreman, office and sales staff." (108 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		107
Number of persons who cast ballots		104
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	55	
Number of ballots marked against applicant	42	
Ballots segregated and not counted	6	

0219-80-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508 (Applicant) v. Alex’s Plumbing & Heating Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: “all plumbers, steamfitters, pipe fitters, gas fitter journeymen and apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th Parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	0	

0264-80-R: Service Employees International Union, Local 183 (AFL, CIO, CLC) (Applicant) v. Lennox and Addington County General Hospital (Respondent).

Unit: “all employees of the respondent at Napanee, Ontario, regularly employed for not more than 24 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor and foreman, chief engineer and office staff.” (18 employees in the unit).

Number of names of persons on revised voters’ list		21
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	1	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0070-80-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Anton Kikas Limited (Respondent) v. Group of Employees (Objectors). (11 employees).

0256-80-R: International Association of Bridge, Structural and Ornamental Ironworkers Local 721 (Applicant) v. Collett Churchward Overhead Doors Limited (Respondent) v. Group of Employees (Objectors). (4 employees).

0511-80-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Unwin Murphy & Esten Limited (Respondent) v. Group of Employees (Objectors). (2 employees).

0565-80-R: Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Beaver Lumber Company Limited (Respondent) v. Group of Employees (Objectors). (3 employees).

0616-80-R: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. C.M. & Superior Drywall & Painting Company Inc., (Respondent). (5 employees).

0639-80-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Markham (Respondent). (122 employees).

0714-80-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America on behalf of Locals 494, 1007, 1410, 1425, 1592, 1669, 1916 and 2309 (Applicant) v. S. Meehan Millwright Services (Respondent). (2 employees).

0722-80-R: Canadian Union of Public Employees (Applicant) v. Modern Building Cleaning, Division of Dustbane Enterprises Limited (Respondent).

Unit #1: (See Bargaining Agents Certified – No Vote Conducted).

Unit #2: “all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period engaged in cleaning services at Crockford Pavillion, (Scarborough General Hospital) Scarborough, Ontario, save and except supervisors, and those above the rank of supervisor, and office, clerical and sales staff.” (4 employees in the unit).

Certification Dismissed Subsequent to Pre-Hearing Vote

0450-80-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. A.G. Simpson Company Limited (Respondent) v. Simpson Plant Council (Intervener).

Voting Constituency: “all employees of the company, save and except foremen, persons above the rank of foreman, office and sales staff.” (500 employees).

Number of names of persons on revised voters' list		606
Number of persons who cast ballots	546	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	214	
Number of ballots marked in favour of intervener	327	
Number segregated and not counted	2	

0520-80-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Bonnie Stuart Shoes Limited (Respondent).

Unit: “all employees of the respondent located at Kitchener, Ontario, save and except foremen, foreladies, persons above the rank of foreman or forelady, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week.” (71 employees in the unit).

Number of names of persons on revised voters' list		77
Number of persons who cast ballots	75	
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	53	
Ballots segregated and not counted	7	

0529-80-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Grimsby (Respondent).

Unit: “all office, clerical, and technical employees of the respondent, save and except department heads, persons above the rank of department head, foremen, persons above the rank of foreman, chief building official, fire chief, deputy treasurer, recreation superintendent – arena manager, assistant to the director of public works, secretary to the town administrator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	12	
Number of segregated ballots	1	
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	5	

0534-80-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75 (Applicant) v. Pearce, Barette Hospitality Management Inc., (Respondent).

Unit: "all employees of the respondent employed at 2 Gloucester Street, Toronto, Ontario, save and except supervisors, those above the rank of supervisor, those employees employed for less 24 hours per week and students employed during the school vacation period." (63 employees).

Number of names of persons on revised voters' list		62
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant	22	
Number of ballots marked against applicant	25	

0691-80-R: International Woodworkers of America (Applicant) v. Monroe Auto Equipment Company of Canada, Division of Tenneco Canada Corp., A Tenneco Company (Respondent).

Unit: "all employees of the respondent at Owen Sound Ontario, save and except department heads, persons above the rank of department head, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (287 employees in the unit).

Number of names of persons on list as originally prepared by employer		293
Number of persons who cast ballots	282	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	68	
Number of ballots marked against applicant	213	

Certification Dismissed Subsequent to Post-Hearing Vote

2119-79-R: United Carment Workers of America (Applicant) v. Durable Sportswear: Dependable Boyswear (Respondent),

- and -

2120-79-R: United Garment Workers of America (Applicant) v. Durable Sportswear: Dependable Boyswear (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman or forelady, office and sales staff, persons regularly employed for less than 24 hours per week and students employed during the school vacation period." (30 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		79
Number of persons who cast ballots	73	
Number of ballots marked in favour of applicant	18	
Number of ballots marked against applicant	55	

0297-80-R: Service Employees International Union Local 183 (AFL, CIO, CLC) (Applicant) v. Carveth Nursing Home Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Gananoque, Ontario, save and except graduate and registered nurses, supervisors, and those above the rank of supervisor and office staff." (50 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		44
Number of persons who cast ballots		44
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	26	
Ballots segregated and not counted	5	

0332-80-R: Canadian Paperworkers Union (Applicant) v. Quinn Containers Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the Company at Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (18 employees in the unit).

Number of names of persons on list as originally prepared by employer		18
Number of persons who cast ballots		16
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	14	

0445-80-R: Canadian Union of Public Employees (Applicant) v. AERIC Incorporated, carrying on business under the firm name and style of "The Conference Board of Canada" (Respondent).

Unit: "all office and clerical employees of the respondent at Ottawa, Ontario, save and except Managers, persons above the rank of manager, research associates, economists and other research staff, executive assistant to the President, assistant to the Director of Conferences, special librarian, senior secretary to each of the following: President, Vice-President and chief economist, and director-compensation research centre, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (29 employees in the unit). (*clarity note*).

Number of names of persons on revised voters' list		30
Number of persons who cast ballots		30
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	16	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0089-80-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Builders Furniture Limited (Respondent).

0510-80-R: International Union of Operating Engineers, Local 793 (Applicant) v. Capital Paving Limited (Respondent).

0513-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Stan Vine Construction Inc. and/or Avena Investments Limited (Respondents) v. Employee (Objector).

0546-80-R: Retail Clerks Union, Local 409 (Applicant) v. Scott National Limited, Dryden, Ontario (Respondent).

0595-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Can-Am Leasing (Respondent).

0602-80-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. International Harvester of Canada (Respondent).

0620-80-R: United Brotherhood of Carpenters and Joiners of America Local 494 (Applicant) v. Woodall Construction Company Limited (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880 (Intervener).

0626-80-R: O.P.S.E.U. (Applicant) v. Bain Apartments Co-Operative Incorporated (Respondent).

0627-80-R: International Association of Machinists & Aerospace Workers, District Lodge 717 (Applicant) v. Koppers Products Limited (Respondent).

0635-80-R: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Random Builders Limited (Respondent).

0654-80-R: International Union of Operating Engineers Local 793 (Applicant) v. Canadian Cutting & Coring Limited (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener).

0656-80-R: Hotels, Clubs, Restaurants & Tavern Employees Union, Local 261 (Applicant) v. Ottawa-Carleton Hospital Food Services Incorporated (Respondent).

0751-80-R: R.J. Stampings Co. Ltd., Employees' Association (Applicant) v. R.J. Stampings Co. Limited (Respondent).

0783-80-R: United Steelworkers of America (Applicant) v. Allis-Chalmers Canada Limited (Pump) Division (Respondent).

0801-80-R: Canadian Labour Congress, Chartered Local Union 1689 (Canadian Association of Burlesque Entertainers) (Applicant) v. Hotel Brampton (Respondent).

APPLICATIONS UNDER SECTION 1(4)

2271-79-R: The Ironworkers; District Council of Ontario, and the International Association of Bridge, Structural and Ornamental Ironworkers, Local Unions 700, 721, 736, 759, 765 and 786 (Applicant) v. William A. Squire, Roy Squire and William Munro, carrying on business as Brant Erecting and Hoisting, Beverly Munro, carrying on business as Provincial Steel and Beverly Munro Inc., carrying on business as Provincial Steel (Respondents). (*Granted*).

0133-80-R: Graphic Arts International Union, London Local 517 (Applicant) v. Devon Studio, Walkerville Printing Company Limited (Respondents.) (*Granted*).

0275-80-R: Retail Clerks International Union, Local 233F affiliated with the Canadian Labour Congress and the AFL, CIO (Applicant) v. Sisman's of Canada Limited (Respondent). (*Dismissed*).

0454-80-R: Canadian Union of Operating Engineers & General Workers Local 101 (Applicant) v. Consolidated Building Maintenance Services Limited, and The Board of Management of the O'Keefe Centre (Respondents). (*Withdrawn*).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

1297-79-U: Robert Pharand, Peter Digiglio and John Tolin et al (Applicants) v. Inco Metals Company (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2338-79-R: The Employees of Jan Peters Trucking and Excavating (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Jan Peters Limited (Intervener). (*Granted*).

Unit: "all employees employed in the industrial, commercial and institutional sector engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the maintaining and repairing of such equipment in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots		14
Number of ballots marked in favour of respondent	5	
Number of ballots marked against respondent	9	

2465-79-R: Robert Woelk and Randal Koop (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Erie Sand & Gravel Limited and Steling Acre Farms Limited (Interveners). (*Granted*).

Unit: "all employees employed at the gravel pits of Erie and Sterling in the County of Essex and Kent, save and except foremen, persons above the rank of foreman, office staff, weigh scale personnel, and drivers who operate licensed vehicles off the gravel pit property." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		7
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	6	

0031-80-R: Fred Brenton (Applicant) v. Service Employees International Union Local 183 (Respondent) v. The Corporation of the County of Lennox & Addington (Intervener). (*Granted*).

Unit: "all Roads Department employees of The Corporation of the County of Lennox & Addington, save and except foremen, persons above the rank of foreman, office and clerical staff, County Library staff, County museum staff, dog catchers, custodian staff, County social services staff, County planning department staff, County administration staff, Lenadco Home for the Aged staff, students regularly employed during the summer vacation period, and employees regularly employed for not more than 24 hours per week." (18 employees in the unit).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots		19
Number of ballots marked in favour of respondent	2	
Number of ballots marked against respondent	17	

0200-80-R: G.T. Couriers (416656 Ontario Ltd.) (Applicant) v. Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (13 employees). (*Dismissed*).

0298-80-R: Carlo Filodoro (Applicant) v. United Steelworkers of America (Respondent). (*Dismissed*).

Unit: "all employees of Merit Automotive Products Limited employed in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (19 employees in the unit).

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots		18
Number of ballots marked in favour of respondent	9	
Number of ballots marked against respondent	9	

0485-80-R: Willena Walsh (Applicant) v. United Food and Commercial Workers International Union Local 175 (Respondent) v. Dunnville Supermarkets Limited (Intervener). (*Dismissed*).

Unit: "all meat department employees of the intervener at Dunnville, Ontario, save and except meat manager, persons above the rank of meat manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation." (3 employees in the unit).

0589-80-R: Carol Spence, on behalf of Employees of Midland Auto Radiator (Applicant) v. Brewery, Soft Drink, Distillery Distributors and Miscellaneous Workers Local 1000 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Midland Auto Radiator Manufacturing Ltd. (Intervener). (12 employees in the unit). (*Dismissed*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0687-80-U: Christopher Electric Limited, Canadian Industrial Electric, Elcon Limited, C & C Enterprises, Electrical Construction Ltd., ICS Construction Ltd. and B.G. Checo Int. Ltd. (Applicants) v. Ed Fellows, Len Dobbs, Gary McLean, Nick Gogas, Members of Local 463 of the International Brotherhood of Electrical Workers, et al, (Respondents). (*Withdrawn*).

0747-80-U: Lewis Insulations Services Inc., (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and J. Duffy (Respondents). (*Withdrawn*).

0761-80-U: Ins-co Sarnia Limited (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, and Mr. J. Duffy (Respondents). (*Withdrawn*).

0762-80-U: Ins-co Sarnia Limited (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, and Mr. J. Duffy (Respondents). (*Withdrawn*).

0769-80-U: The Sarnia Construction Association (Applicant) v. International Association of Heat and Frost Insulations and Asbestos Workers, Local 95 and J. Duffy (Respondents). (*Dismissed*).

0828-80-U: Mathews Conveyer Company, A Division of Rexnord Canada Limited (Applicant) v. International Association of Machinists and Aerospace Workers, Local 1805, Alex Walker, Chris May, Dave Williams, R.W. Morris, John Sanche and John Brown et al (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

0753-80-U: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Superior Oil Company, and Liquiflame Oils, A Division of Ultramar Canada Inc., (Respondent). (*Dismissed*).

0813-80-U: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Aztec Steel Manufacturing Inc. (Respondent). (*Granted*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0217-80-U: Local 1979, Retail Clerks International Union affiliated with the Canadian Labour Congress AFL, CIO (Applicant) v. Wilson Automotive (Belleville) Limited (Respondent). (*Granted*).

0429-80-U: Service Employees' International Union, Local 183 AFL, CIO, CLC (Applicant) v. S. & A. Investments Limited and/or Belleville Plaza (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1300-79-U: International Union of Operating Engineers, Local 793 (Complainant) v. Kaymick Enterprises Limited (Respondent). (*Granted*).

1838-79-U: Canadian Textile and Chemical Union (Complainant) v. Silknit Limited (Textile Division) (Respondent) v. United Textile Workers of America (Intervener). (*Dismissed*).

2182-79-U: Greater Northern Ontario Trucking Association (Complainant) v. Walker Brothers Quarries Limited (Respondent). (*Dismissed*).

2209-79-U: Rene Lalonde (Complainant) v. Local 2900 U.S.W.A. (Respondent). (*Dismissed*).

2246-79-U: Mario Moreira (Complainant) v. Labourers' International Union of North America, Local 506 and Labourers' International Union of North America (Respondents) v. Ontario Hydro (Intervener). (*Granted*).

0082-80-U: Cliff Wilson (Complainant) v. United Brotherhood of Carpenters and Joiners of America and Local Union 2737 (Respondent). (*Granted*).

0148-80-U: Canadian Union of Public Employees (Complainant) v. Consolidated Maintenance Services Limited (Respondent). (*Granted*).

0304-80-U: Hotel and Club Employees' Union, Local 299 Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union (AFL, CIO, CLC) (Complainant) v. Skyline Hotel and Cambridge Hotel (Respondents). (*Withdrawn*).

0335-80-U: Kesar Singh Riyait (Complainant) v. Local 1590, International Brotherhood of Electrical Workers (Respondent) v. I.T.E. Industries Ltd. (Intervener). (*Dismissed*).

0358-80-U: John Ballantyne, on behalf of Don MacKenzie, Malcolm Ryckman, Mike Anderer, D. Smith, Frank Ellery, Jim Cator, Wayne Gilliss, James McKellar, H. Potter, Dan Canfield, R. Charbonneau (Complainant) v. Teamsters Union Local 938, Teamsters Local 879 (Respondents). (*Withdrawn*).

0365-80-U: George Maglasis & George Papoutsis (Complainants) v. International Ladies' Garment Workers' Union (Respondent) v. Irving Posluns Sportswear (Intervener). (*Dismissed*).

0369-80-U: Madeline Trahan, (Complainant) v. Ronald Schroeder & U.A.W. (Respondents). (*Withdrawn*).

0373-80-U: Harold A. Turk (Complainant) v. Harnden and King Construction Ontario Limited (Respondent). (*Withdrawn*).

0374-80-U: Morley R. Bursey (Complainant) v. Harnden and King Construction Ontario Ltd. (Respondent). (*Withdrawn*).

0417-80-U: The Mount Nemo Truckers Association, Local 566 (Complainant) v. Nelson Crushed Stone, A Division of King Paving & Materials, A Division of the Flintkote Company of Canada Ltd., and Torres Transport Ltd., and King Paving & Materials and Flintkote Company of Canada Limited (Respondents). (*Withdrawn*).

0425-80-U: John Sukkel and Peter Sukkel (Complainants) v. The United Brotherhood of Carpenters and Joiners of America, Local 18 and Pigott Construction Limited (Respondents). (*Withdrawn*).

0428-80-U: Service Employees International Union, Local 183, AFL, CIO, CLC (Complainant) v. S. & A. Investments Ltd., and/or Belleville Plaza (Respondent). (*Withdrawn*).

0451-80-U: Ontario Public Service Employees Union (Complainant) v. Fleetwood Ambulance Services (Respondent). (*Withdrawn*).

0452-80-U: Labourers' International Union of North America, Local 527 (Complainant) v. The Dale Corporation (Respondent). (*Withdrawn*).

0464-80-U: Ken Hisko (Complainant) v. John Edwards (Respondent) v. Joe Grills (Intervener). (*Dismissed*).

0491-80-U: Ontario Taxi Association, Local 1688, CLC (Complainant) v. Windsor Airline Limousine Services Ltd. carrying on business as Veteran Taxi Company (Respondent),
- and -

0492-80-U: Ontario Taxi Association, Local 1688 CLC (Complainant) v. Windsor Airline Limousine Services Ltd. carrying on business as Veteran Taxi Company (Respondent). (*Granted*).

0494-80-U: Ontario Public Service Employees' Union (Complainant) v. Hotel Dieu Hospital, Windsor (Respondent). (*Withdrawn*).

0505-80-U: Brian Douglas Benore (Complainant) v. Johb D. McManus (Respondent). (*Withdrawn*).

0523-80-U: Canadian Chemical Workers Union and its Local 26 (Complainant) v. Johns-Manville Canada Inc., (Respondent). (*Withdrawn*).

0525-80-U: George E. Atkinson, Gerry Stefaniuk (Complainants) v. L. Kovacs (Pres.) & L. Sims (Bus. Agent CUPE Local 43 (Respondents). (*Withdrawn*).

0532-80-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Aztec Steel Manufacturing Inc. (Respondent). (*Granted*).

0543-80-U: Mr. Lyle Straight (Complainant) v. The Municipal Corporation of the Township of Edwardsburg (Respondent). (*Withdrawn*).

0549-80-U: United Rubber, Cork, Linoleum and Plastic Workers of America, (Hereinafter referred to as URW) v. (Complainant) v. Kodiak Crane Corporation (Respondent). (*Granted*).

0554-80-U: Eva Burt (Complainant) v. Thomas Product Co. Ltd. (Respondent). (*Dismissed*).

0555-80-U: Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Purity Zinc Metals Co. Ltd. (Respondent). (*Withdrawn*).

0566-80-U: International Molders & Allied Workers Union (Complainant) v. Southern Wood Products Limited (Respondent). (*Withdrawn*).

0569-80-U: Gerard Francis Dunphy (Complainant) v. Canadian Food & Allied Workers & John Dinardo (Respondents). (*Withdrawn*).

0573-80-U: Nelson Crushed Stone, A Division of King Paving and Materials, A Division of the Flintkote Company of Canada Limited (Complainant) v. The Mount Nemo Truckers Association Local 566 (Respondent). (*Withdrawn*).

0582-80-U: Retail, Wholesale and Department Store Union, AFL, CIO, CLC (Complainant) v. Country Style Donuts operated by John Kumer and Adolph Amsterdamam (Respondent). (*Withdrawn*).

0593-80-U: Mark Holman (Complainant) v. Toronto Civic Employees Local 43 (Respondent). (*Withdrawn*).

0601-80-U: Gary Matthews (Complainant) v. Rexdale Platics Limited (Respondent). (*Withdrawn*).

0607-80-U: Mike Young (Complainant) v. Claude Picard (Respondent). (*Withdrawn*).

0621-80-U: United Steelworkers of America (Complainant) v. Fotomat Canada Limited (Respondent). (*Withdrawn*).

0647-80-U: Retail, Wholesale and Department Store Union AFL, CIO, CLC (Complainant) v. Marche Lalonde (Respondent). (*Withdrawn*).

0648-80-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Belfor & Co. Ltd. (Ottawa, Ontario) (Respondent). (*Withdrawn*).

0657-80-U: Robert Bonspiel (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) Local 252 (Respondent). (*Withdrawn*).

0660-80-U: Canadian Union of Public Employees Local 1281 (Complainant) v. Canadian Union of Educational Workers (Respondent). (*Withdrawn*).

0663-80-U: Hotel and Restaurant Employees Union, Local 743, affiliated with Hotel and Restaurant Employees and Bartenders International Union (Complainant) v. 355621 Ontario Limited, c.o.b. Dairy Queen (Respondent). (*Withdrawn*).

0675-80-U: Keith Young (Complainant) v. Boilermakers, Local 128 (Respondent) v. The Electrical Power Systems Construction Association (Intervener #1) v. Ontario Hydro (Intervener #2). (*Withdrawn*).

0703-80-U: Manuel De Sousa, Manuel Bettencourt, Fernando Dores, Jose Amaral and Dento Soares (Complainants) v. Labourers' International Union of North America, Local 506 and Modern Building Cleaning, a division of Dustbane Enterprises Limited (Respondents). (*Terminated*).

0709-80-U: Robert Strutt (Complainant) v. Hilroy Limited (Respondent). (*Withdrawn*).

0711-80-U: Communications Workers of Canada (Complainant) v. Alliance Communications (Respondent). (*Withdrawn*).

0717-80-U: United Steelworkers of America (Complainant) v. Heritage Stoves Ltd. (Respondent). (*Withdrawn*).

0724-80-U: Canadian Union of Public Employees (Complainant) v. County of Middlesex (Respondent). (*Withdrawn*).

0725-80-U: Labourers' International Union of North America, Local 183 (Complainant) v. Burlington Carpet Mills Canada Ltd. (Respondents). (*Withdrawn*).

0754-80-U: The International Association of Machinists and Aerospace Workers (Complainant) v. Revco Ltd. (Respondent). (*Withdrawn*).

0767-80-U: United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Aztec Steel Manufacturing Inc. (Respondent). (*Granted*).

0810-80-U: Timothy Joseph Knott (Complainant) v. Local 442, Hotel, Motel and Restaurant Employees Union (Respondent). (*Withdrawn*).

0837-80-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Russell MacVicar Limited (Respondent). (*Dismissed*).

APPLICATIONS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

2124-79-OH: Albert Gedraitis (Complainant) v. Adelaide Building Services (Respondent). (*Dismissed*).

0778-80-OH: United Steelworkers of America, Local 2251, on behalf of Mr. L. Pucci (Complainant) v. The Algoma Steel Corp. Ltd. (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39

0182-80-M: James Chak-To Yu (Applicant) v. Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent Trade Union) v. Society for Goodwill Services (Respondent Employer). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0550-80-M: Amalgamated Clothing and Textile Workers Union Local 1125 (Trade Union) v. Globe Mills Ltd. (Employer). (*Granted*).

0604-80-M: National Association of Broadcast Employees and Technicians (Trade Union) v. The Ontario Educational Communications Authority (Employer). (*Granted*).

APPLICATIONS UNDER SECTION 55

0218-80-R: Retail Clerks International Union, Local 233F, Footwear Division Affiliated with the Canadian Labour Congress and the AFL, CIO (Applicant) v. Sisman's of Canada Limited (Respondent). (*Granted*).

0474-80-R: Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Applicant) v. Clean & Brite Laundry (Respondent). (*Granted*).

APPLICATION FOR THE SCHOOL BOARDS AND TEACHERS COLLECTIVE NEGOTIATIONS ACT 1975, UNDER SECTION 68

1047-79-U: Ontario Secondary School Teachers' Federation, District II (Applicant) v. York County Board of Education (Respondent). (*Dismissed*).

JURISDICTIONAL DISPUTES

0401-80-JD: International Union of Elevator Constructors, Local 90, hereinafter called Elevator Constructors (Complainant) v. The International Association of Bridge, Structural, and Ornamental Ironworkers, Local 736, and Hoffend & Sons Inc. (Respondents). (*Dismissed*).

0658-80-JD: Doef's Ironworks Ltd. (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local 128, and International Association of Bridge, Structural Ornamental & Ironworkers Local 721 (Respondents). (*Interim Order - Granted*).

APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82

2038-78-M: Ontario Public Service Employees Union (Applicant) v. St. Clair College of Applied Arts & Technology (Respondent). (*Dismissed*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1613-79-M: The Regional Municipality of Waterloo (Sunnyside Home) (Applicant) v. Ontario Nurses' Association (Respondent). (*Granted*).

2348-79-M: Office and Professional Employees International Union, Local 452 (Applicant) v. The Corporation of the City of Cornwall (Respondent). (*Terminated*).

0047-80-M: The Corporation of the Town of Hawkesbury (Applicant) v. The Canadian Union of Public Employees and its Local 1026 (Respondent). (*Terminated*).

0488-80-M: The Family & Children's Services of Hastings County (Applicant) v. Canadian Union of Public Employees, Local 2197 (Respondent). (*Withdrawn*).

0645-80-M: Service Employees Union, Local 204 (Applicant) v. Kennedy Lodge Nursing Home (Respondent). (*Withdrawn*).

0685-80-M: United Glass and Ceramic Workers of N.A. (Applicant) v. SciCan Scientific Limited (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 112(a)

2294-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 552 (Applicant) v. Fischbach & Moore of Canada Limited (Respondent). (*Withdrawn*).

0274-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. Affirmed Forming Limited (Respondent). (*Withdrawn*).

0286-80-M: International Union of Operating Engineers Local 793 (Applicant) v. Taggart Construction Limited (Respondent). (*Dismissed*).

0291-80-M: International Union of Operating Engineers Local 793 (Applicant) v. Jan Peters Limited (Respondent). (*Granted*).

0465-80-M: Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Seal-Rite Caulking (Respondent). (*Granted*).

0471-80-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Deuces Masonry Limited (Respondent). (*Granted*).

0476-80-M: - and -

0477-80-M: - and -

0478-80-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dewmat Developments Inc. (Respondent). (*Granted*).

0479-80-M: Sheet Metal Workers' International Association Local Union 30 (Applicant) v. Bothwell Accurate Limited (Respondent). (*Granted*).

0481-80-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 508 (Applicant) v. G. & H. Mechanical (Respondent). (*Withdrawn*).

0575-80-M: Labourers' International Union of North America, Local 527 (Applicant) v. John Rae & Sons Construction Limited (Respondent). (*Withdrawn*).

0584-80-M: International Union of Operating Engineers Local 793 (Applicant) v. Don Hart Construction (Respondent). (*Withdrawn*).

0608-80-M: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Lapico Construction Limited (Respondent). (*Granted*).

0609-80-M: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Sanpico Construction Ltd. (Respondent). (*Withdrawn*).

0646-80-M: International Union of Operating Engineers Local 793 (Applicant) v. Salvador Excavating Limited (Respondent). (*Granted*).

0651-80-M: International Union of Operating Engineers Local 793 (Applicant) v. Lightfoot Construction Ltd. (Respondent). (*Granted*).

0702-80-M: International Union of Operating Engineers Local 793 (Applicant) v. Romano Construction Company (Respondent). (*Withdrawn*).

0705-80-M: Labourers' International Union of North America, Local 247 (Applicant) v. C.E. Refractories (Respondent). (*Withdrawn*).

0731-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. 394436 Ontario Limited Coram Contracting (Respondent). (*Granted*).

0742-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. 415511 Ontario Limited (Dax Properties Ltd.) (Respondent). (*Withdrawn*).

0768-80-M: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Centre Cooling Systems Limited and/or Centre Cooling Systems (Contracting) Limited (Respondents). (*Withdrawn*).

0800-80-M: The International Brotherhood of Painters and Allied Trades and the Ontario Council of Painters and Allied Trades and Local 1590, Sarnia Ontario (Applicant) v. Jos Zuliani Glass Ltd. (Respondent). (*Withdrawn*).

0802-80-M: The International Brotherhood of Painters and Allied Trades and the Ontario Council of Painters and Allied Trades and Local 1590 Sarnia Ontario (Applicant) v. Sarnia Glass and Aluminum Products Ltd. (Respondent). (*Withdrawn*).

0804-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Formwork Association and Maplecrete Forming Limited (Respondents). (*Withdrawn*).

0805-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Formwork Association and Lerima Construction Limited (Respondents). (*Withdrawn*).

0822-80-M: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. R.C. Lundstrom Construction (Respondent). (*Withdrawn*).

0832-80-M: Labourers' International Union of North America, Local 183 (Applicant) v. Ontario Formwork Association and Consolidated Concrete Structures Limited (Respondents). (*Withdrawn*).

0863-80-M: International Union of Operating Engineers Local 793 (Applicant) v. Employer Bargaining Agency and Williams Contracting Ltd. (Respondents). (*Granted*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

7489-74-R: Sheet Metal Workers' International Association, Local Union 47 (Applicant) v. L.A. Graves Building Services Limited (Respondent). (Certified). (*Withdrawn*).

1260-78-R: Christian Trade Unions of Canada (Local 6) (Applicant) v. Per-fec-tion Insulations Limited (Respondent). (Certification). (*Request Denied*).

1769-78-R: Christian Trade Union of Canada (Local 6) (Applicant) v. Per-fec-tion Insulations Limited (Respondent). (Certification). (*Request Denied*).

0150-79-R: - and -

0153-79-R: Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 (Applicant) v. Fuller's Restaurant (Respondent) v. Group of Employees (Objectors). (Certified). (*Dismissed*).

0174-79-R: Construction Workers Local No. 6, affiliated with the Christian Labour Association of Canada (Applicant) v. Per-fec-tion Insulations Limited (Respondent). (Certification). (*Request Denied*).

2229-79-R: Hotel and Club Employees' Union, Local 299, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (AFL, CIO, CLC) (Applicant) v. Skyline Hotel (Respondent) v. International Beverage Dispensers' and Bartenders' Union Local 280 (Intervener). (Certification). (*Request Denied*).

0073-80-R: - and -

0074-80-R: Hotels, Clubs, Restaurant, Tavern Employees' Union, Local 261 (Applicant) v. Fuller's Restaurant (Respondent) v. Group of Employees (Objectors). (Certified). (*Dismissed*).

0125-80-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. G.T. Couriers 416656 Ontario Limited (Respondent). (Section 79). (*Request Denied*).

0421-80-R: Labourers' International Union of North America, Local 183 (Applicant) v. Browne, Cavell & Jackson Limited (Respondent) v. Group of Employees (Objectors). (Certification). (*Dismissed*).

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